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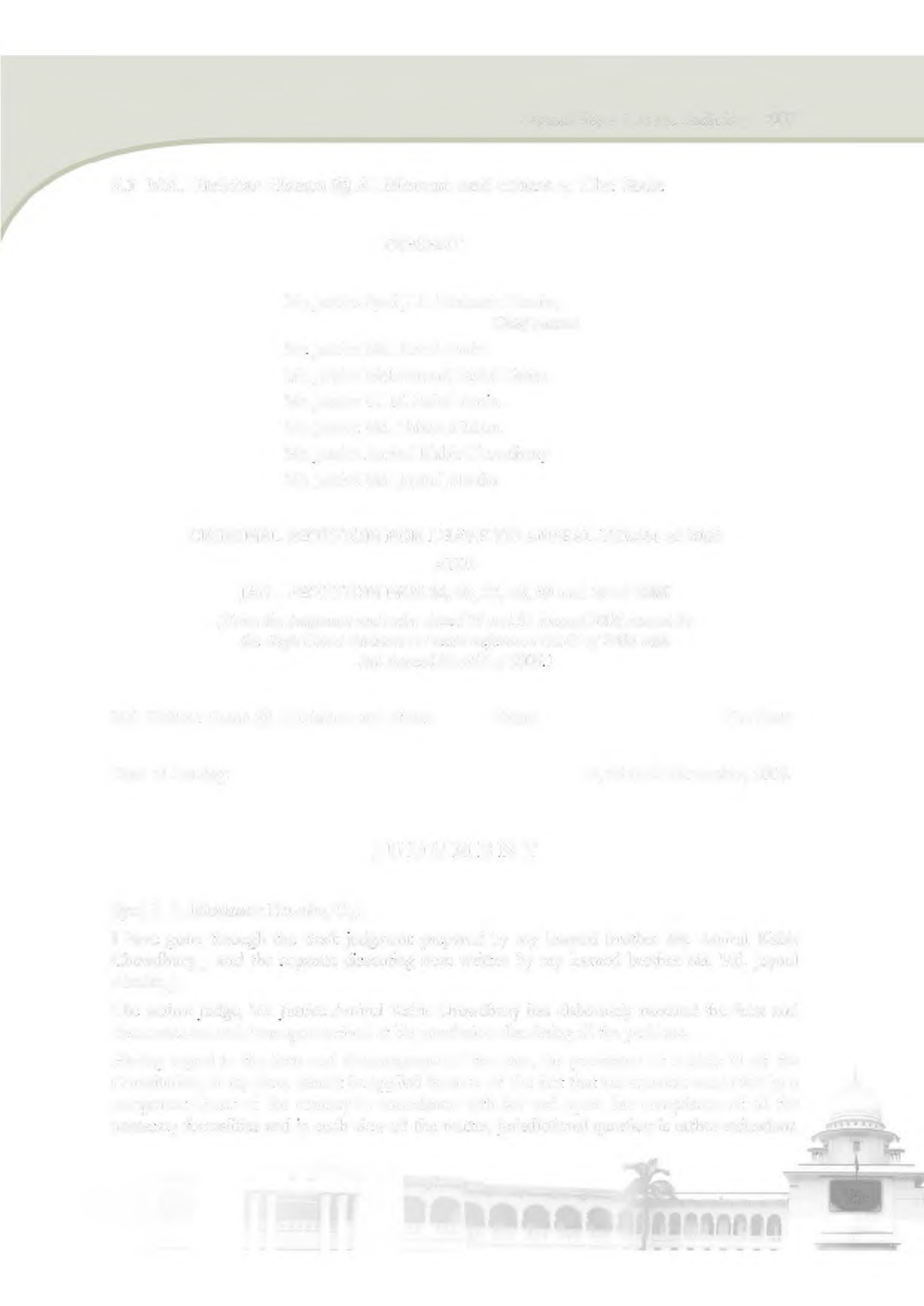
Important Judgments of the Appellate Division of the Supreme Court in 2006-2007

Court Room of the Chief Justice of Bangladesh



In the resu.t, I also dismiss all the petitions and I fully concur with the judgment delivered by Mr. Amirul Kabir Chowdhury, J.

Md. Ruhul Amin, J.

I have gone through the draft judgment prepared by brother Mr. Amirul Kabir Chowdhury, J. and the separate note written by brother Mr. Md. Joynul Abedin, J. agreeing with the conclusion arrived at and made by brother Mr. Amirul Kabir Chowdhury, J.

I am sorry that I differ with the view expressed by my brother Md. Joynul Abedin, J. as to the provision of Article 31 of the Constitution relating to the matter of awarding of sentence of death under the provision of the Penal Code or any other special law. Since the four convicts, as to whom my brother Joynul Abedin, J's separate note relates, were tried by the competent Court in accordance to the law of land and as such jurisdictional question raised by the convicts was quite not relevant. Moreover where law of the land provides for sentence of death in respect of certain offence and one who has been sentenced to death quite in accordance to law for the commission of the offence providing sentence of death, his contention referring to provision of Article 31 of the Constitution so far provision thereof relates to 'right to life' is not well founded in law.

I agree with the judgment as well as the conclusion arrived at by my brother Mr. Amirul Kabir Chowdhury, J.

Mohammad Fazlul Karim, J.

Perused the attached note of my brother Md. Joynul Abedin, J along with the contention in appeal raised by the four convicts who have been sentenced to death by the trial court in accordance with law.

Since the convicts have disowned the jurisdiction of this Court thereby remained satisfied with the judgment under appeal displaying certain purely religious sentiments which a Court of law established by law has nothing to do and on my perusal of the impugned judgment no illegality is apparent therein to be interfered with, I am of the view that the provision of Article 31 of the Constitution has no manner of application in the instant case.

In the result, I agree with the judgment and order of my learned brother Amirul Kabir Chowdhury, J.

M. M. Ruhul Amin, J.

I have gone through the judgment proposed to be delivered by my learned brother Amirul Kabir Chowdhury, J and the separate notes added by my learned brother Md. Joynul Abedin, J. agreeing with the judgment of Amirul Kabir Chowdhury, J.

In my view the provisions of Article 31 of the Constitution as mentioned by Md. Joynul Abedin, J. are not applicable in the present case as the convicts were tried by a competent court as per provisions of law of the land after complying with all necessary legal formalities and as such the jurisdictional question as raised by the convicts are rather irrelevant. I agree with my learned brother Amirul Kabir Chowdhury, J.

Md. Tafazzul Islam, J.

I have gone through the draft judgment prepared by brother Amirul Kabir Chowdhury, J. and also the separate note added by brother Md. Joynul Abedin, J. agreeing with the conclusion arrived at by my brother Amirul Kabir Chowdhury, J but expressing the view that in view of the fundamental right guaranteed under Article 31 of the Constitution and the condemned prisoners having taken the ground that courts below did not have jurisdiction to try the condemned prisoners, a substantial question of law has been raised warranting this Court to look into the legality and propriety of their conviction and sentence. I differ with the above view expressed by my brother Md. Joynul Abedin, J. as the condemned convicts were tried by a competent Court in accordance with law of the land which provides for sentence of death in respect of offence under which the condemned prisoners were tried and so they cannot take shelter of the provisions of Article 31 of the Constitution. I agree with the judgment as well as the conclusion arrived at by my brother, Amirul Kabir Chowdhury, J.

Amirul Kabir Chowdhury, J.

Jail Petition No.04 of 2006 has been preferred by petitioner (1) Md. Iftekhar Hasan @ Al-Mamun, Petition No.07 of 2006 is at the instance of (2) Shayekh Abdur Rahman Ibne Abdullah @ Ehsan @ Maolana Abdur Rahman, Petition No.08 of 2006 is by (3) Md. Siddiqul Islam @ Azizul Islam @ Omar Ali @ Litu Miah @ Bangla Bhai, Petition No.09 of 2006 arises at the instance of (4) Md. Ataur Rahman @ Tariq Sani Ibne Abdullah while Petition No.10 of 2006 is at the instance of (5) Abdul Awal @ Arafat @ Samad @ Asif hereinafter referred to as the petitioners. The judgment and order dated 29 and 31 August 2006 in Death Reference No.47 of 2006 with Jail Appeal No.457 of 2006 passed by the High Court Division against the aforesaid petitioners (condemned prisoners) gives rise to the petitions mentioned above.

Md. Faruk Hossain Khan @ Faruk @ Khaled Saifullah @ Amjad, another condemned prisoner, on the other hand, submitted Jail Petition No.06 of 2006 regarding the aforesaid judgment and order but later filed Criminal Petition for leave to appeal registered as Criminal Petition for Leave to Appeal No.444 of 2006 and Mr. M. Shamsul Alam learned Counsel representing him did not press the said Jail Petition in view of filing of the fresh petition for leave.

The learned Additional Sessions Judge, Jhalakati by judgment and order dated 29.05.2006 in Sessions Case No.28 of 2006 convicted the aforesaid six petitioners and co-accused Ashadul Islam @ Arif, who is absconding althrough, under Sections 120B and 324/302/34 of the Penal Code and sentenced each of them to death. Another accused Md. Sultan Khan has however been acquitted. The learned Additional Sessions Judge after passing the said judgment submitted proceedings to the High Court Division under Section 374 of the Code of Criminal Procedure on the basis of which Death Reference No.47 of 2006 was started. The aforesaid Jail Appeal No.457 of 2006 was preferred by condemned prisoner Md. Iftekhar Hasan @ Al-Mamun @ Shiheb against the aforesaid judgment and order of the trial court. The Death Reference and the aforesaid jail appeal being heard together the High Court Division by the impugned judgment and order accepted the Death Reference and dismissed the jail appeal.

Md. Abdur Rahman Bin Abdullah Bin Fazal in his lengthy petition stated, inter-alia, **ÒAvR Avgv‡` i Y ‡k bex(nt) Gi wPÎ cwÎmi K‡i gyjgbivK‡di‡` i "Zix wPÎ e¨e¯'q wPÎ cÖ_x‡¶Q|**

AZGe hÂvgvwRi ¯ZixKivmvwnZb, wZwb evAvBwbi Kv‡Q wPwi cÖ¯Íve Zvivw`‡R‡` i‡K gyjgvb ¯^vex Ki‡jI ZvivBgvb¯^vi bq e‡j DciD³ AvqvZ Avj-vnZvjvRvwbqv wb‡qœQvb| Kv‡RB hw` †Kvb Bgvb wa¯‹kx KvR K‡i Z‡e gyjgv ¯^vexKi‡jB Zv‡i †hvM¨ ¯^qvi n‡ebv|

G †_‡K G¨v‡ki wbhy³Z gyjgv RbMY‡K gy³ Kiv Rb¨ 150 (GKkZ) ermi ci Avevwiv ÒRvgvÛZj gÄyix¯^xb Ó evsjv‡`k| G¨v‡k Avj-vni AvBbwU‡K ev¯—evqbi Rb¨ Avj-vni wb‡`©kZ nk¯¿xRvi ¯^ii“ K‡i‡Q, Avjvg¯^yjj-vn| †R,Gg, wR, Gi gvÎ ¯^vÄ GKkZ gÄyix¨ i cwnZzB G ¯^k Bmjvg cÖKvwnZebv Avj-vn Pv‡'Ob Avevwi‡KQyAvj-vni ev¯^vZvi wZwb cÖKvwi Rb¨ Rxeb¯^b Ki‡K Zvi ci wZwb Zvi ev¯—vq i cÖK mš¿vmq G ¯^k Bmjvgx AvBb cÖKvwi K‡i w`‡eb Bbkv Avj-vn|Ó

Md. Siddiqul Islam Bangla Bhai in his petition stated, inter-alia, **ÒAvwg Bmjvg kwiqv †gvZv‡eK wPwi Kwi‡j Avcvj Kwie Ó| ÒAvj-vn e‡jbt Zvq wK ZvnvwMK ¯^L bvB hvnv¯^v¶ AeZxi©nBqv‡Q Ges †Zvgvi cÖK hvnv AeZxi©nBqv‡Q Zvnv‡Z Zvnvi wkÿv K‡i, A_P Zvnv Zv_‡Zi Kv‡Q wPwi cÖ¯Íve‡Z Pvq, hw` DnvcZ¨vL¨v Kiv Rb¨ ZvnvwMK wb‡`©k ¯^qvnBqv‡Q Ges kqZvb ZvnvwMK fxlbfv‡e c_åó Kwi‡Z Pvq Ó| (mÿv wbm¨-60) Avwg GKRb gyjgv wZwb wPwii ¯^ii“ n‡Z †KviAvb I mvwnZtiv Avgvi wPwi Kiv Avneb K‡i‡Q wK¬'Zv_‡Zi ZjcxevnK wPwiK Zvbv K‡i eis e¦vwki †Mjvg evbvbv AvBb wPwi K‡i Avgvi g„Zy¨ `Ûv¯^k cÖvb K‡i‡Qb| Avj-vn e‡jbt wZwb wbeiv AvwKvi †Kej Avj-vni (mÿvBDmy¦-40) ZvB gyjxg wZwb G AvBb wPwi cÖ¯Íve Cgvb _vK‡ebv Avwg †KvUv©Avcvj Kwie bv|**

The petitioner Abdul Awal in his petition stated **ÒAvgvi wi‡×, †h g„Zz¨ `Ûv¯^k cÖvb Kivn‡q‡Q, †m wcÖq n‡Z Avwg mvaviY‡K wb‡R‡K wbh©vwZ gvb Kwi| Avwg Avcvj Ki‡Z PvB, hw` Avgv‡K AvZ¥¶ mg_©bi mÂhM ¯^qvnq Ges Bmjvg AbÂqvwPwi Kivnq|**

Avwg AvkvKwi, D'P Av`vj‡Z Dcw¯ÍZ n‡q, AvZ¥¶ mg_© I Bmjvg AbÂqvwPwi cÖ¯Íve qvi mÂqvM¨ ¯^qvn‡e Avgv‡K| G Qvov Ab¨ †Kvb e¨e¯'vMY Kiv n‡j, Avj-vni wbKU cÖK¯—vbi Avkvq ¯^ah©avib Kie Bbkv Avj-vi|

Avgvi g„Zz¨ `Û KvRvixKiv wi‡× gmgvb¨ D'P Av`vj‡Z vj f ïbAvcvj Ki‡Z B'Oq, hw` Avgv‡K AvZ¥¶ mg_©bi mÂhM¨ ¯^qvnq Ges Bmjvgxwnab AbÂqvwPwi Kvh©vwPÎ bvKivnq|Ó

The petitioner Abdul Awal in his petition further stated **ÒAZGe Avgvi g„Zz¨ Ûv¯^k KvRvixKiv wi‡× D'PZi Av`vj‡Z Bmjvgxi¶ †ewMÄb K‡i Avj-vni AvBb c‡`ivq wPwi Kiv Av‡e`b Kiv‡Q Ab¨_v m¤¢e bvn‡j Avgvi wPwi ZvwExAvBb bvKiv Av‡e`b Kiv‡Q|Ó**

Other Accused Md. Faruk Hossain Khan filing petition for leave to appeal challenged the impugned judgment and order of his conviction and sentence and has been represented by his learned Counsel Mr. M. Shamsul Alam.

Prosecution case in brief is that on 14.11.2005 at about 8.50 A.M. Md. Sultan Ahmed Khan (P.W.1) driver of the judgeship of Jhalakati took out the vehicle as usual and proceeded to pick up the judges namely, Jagannath Parey, Sohel Ahmed and others for taking them to the court and accordingly he collected the aforesaid two Judges who were on board in his vehicle and he also took Abdul Mannan Howlader (P.W.14) a peon in the said vehicle and that after taking them he proceeded to pick up another Judge namely, Mr. Abdul Awal and stopped the vehicle in the gate of Mr. Awal and while he was calling Mr. Awal he heard a huge monstrous sound and coming out from the house of Mr. Awal he found the vehicle, damaged to pieces and Judge Sohel Ahmed was found hanging with the vehicle while the other Judge Jagannath Parey was lying with injuries and

that he found Mannan (P.W.14) and another person named Badsha Mia (P.W.11) also lying there with injuries and that he also saw another man lying there with bleeding injuries on the ground and that the injured persons were taken to hospital on rickshaw and he narrated the occurrence to the police and also about the other injured person that the said person was found immediately before the occurrence by him with a bag in his hand and later from his possession some leaflets claiming introduction of Quaranic Law were also recovered and that the witness was told by peon Mannan that aforesaid other injured person showed a paper to Judge Sohel Ahmed and taking advantage of handing over the paper on the plea of collecting address, the aforesaid person, whose name transpired as Mamun, exploded bomb through the window of the vehicle and two others namely, Badshah and Mannan (P.Ws.11 and 14) were thus injured and the two Judges Sohel Ahmed and Jagannath Parey were thus killed. On the basis of the statement of this witness, Jhalakati P.S. Case No.12 dated 14.11.2005 was started against condemned prisoner Mamun and others under Sections 302/34 of the Penal Code.

During investigation accused (1) Shayekh Abdur Rahman, (2) Md. Siddiqul Islam Bangla Bhai, (3) Md. Ataur Sani, (4) Abdul Awal, (5) Md. Iftekhar Hasan @ Al-Mamun and (6) one Sultan Khan were arrested. The investigating officer visited place of occurrence, seized alamats and examined witnesses.

On 24.11.2005 accused Md. Iftekhar Hasan @ Al-Mamun was produced before Mr. Md. Safiq Anwar, Metropolitan Magistrate, Dhaka (P.W.41) to whom the accused gave a confessional statement recorded by the aforesaid learned Magistrate. After investigation P.W.44 Munshi Atiqur Rahman submitted chargesheet on 21.03.2006 against the petitioners and absconding accused Asadul Islam Arif and one Md. Sultan Khan under Sections 120B/326/302/427/109/34 of the Penal Code. The case thereafter being sent for trial was registered as Sessions Case No.28 of 2006 in the Court of the learned Sessions Judge, Jhalakati and was transferred to the learned Additional Sessions Judge for trial.

The trial court framed charges against the accused under Sections 120B/302/34 and Section 326 of the Penal Code. Co-accused Md. Faruk Hossain Khan @ Faruk @ Khaled Saifullah @ Amjad and accused Arif being then in abscondence could not be examined while other accused were examined accordingly.

Accused (1) Shayekh Abdur Rahman, (2) Md. Siddiqul Islam Bangla Bhai, (3) Md. Ataur Rahman Sani, (4) Abdul Awal and (5) Md. Iftekhar Hasan @ Al-Mamun in reply to the charge did not deny the charges in so many words and claimed to be tried according to law of Allah (**Ayj -ui AvBjb wPi PB**). Accused Sultan Khan (since acquitted) pleaded absolute innocence and claimed to be tried.

Mr. Md. siddique Hossain a Senior Advocate of local Bar was appointed as State defence lawyer to represent all accused as they did not appoint any lawyer of their choice. During the trial prosecution produced 44 witnesses while defence did not examine any one. As already mentioned above this is a case in which the petitioners did not raise plea of innocence rather they claimed to have taken their stand against the present law of the country in order to establish law of Allah.

P.W.1 Md. Sultan Ahmed Khan driver attached to the judgeship of Jhalakati is the informant of the case who in his deposition narrated the occurrence as already mentioned while describing the prosecution case. In his deposition he stated that at the time of occurrence of explosion of bomb in the vehicle the two Judges were killed and two others namely, Mannan and Badshah were injured. He further deposed that another person who was also injured was found by him carrying a bag in

his hand before the occurrence and after the occurrence some leaflets were also found in his possession wherein it was written **Ògvbe iwZ AvBb gvb by¨ ‡KviAv‡bi AvBb Pj¨vKiÓ** and that some bombs were also found in his possession and later his name was disclosed as Mamun. The witness identified condemned ptitioner Mamun on dock. He also proved the ejaher lodged by him. In cross-examination he admitted that he did not know accused Mamun from before.

P.W.2 Abdul Barek Khan, a shopkeeper having his shop near the place of occurrence deposed that during April-May 2005 he saw a man selling honey and on query the man disclosed his name as Mehdhi and used to come to his shop off and on and that Mehdhi told him that he was linked with an Islamic party and through constant discussion the witness also felt interested in Islamic party and seeing interest, the witness was invited to Mirdha Bari situated at Rupatali Laldigir Par and he went there and found aforesaid Mehdhi along with some others and that thereafter on one occasion Mehdhi took a loan of TK.500/- from the witness and the witness in the first week of October had been to the aforesaid house at Mirdha Bari for the money and found Mehdhi along with some other persons coming to the house at about 10/10-30 P.M. and he found amongst others accused Mamun (petitioner in Jail Petition No.04 of 2006) and Arif (absconding accused) and that the witness was told that the leaders of the Islamic party about whom the witness was told earlier would come to the house and the witness was asked to wait and accordingly he waited there and at about 12 to 12.30 at night five other persons came and on query Mehdhi disclosed their names as 1) Shayekh Abdur Rahman, (2) Md. Siddiqul Islam Bangla Bhai, (3) Md. Ataur Rahman @ Tariq Sani, (4) Abdul Awal, and (5) Amzad @ Khaled Saifullah (the petitioners in Jail Petition Nos.07 of 2006, 08 of 2006, 09 of 2006, 10 of 2006 and Civil Petition No.444 of 2006 respectively). Thereafter some other persons also came and a meeting took place. The witness narrating the meeting deposed **Ògvëiv G euqvkvqL Ave`¨ gngb, evsjv‡`k etj ‡h, Bmjvgx AvBb ev¯— evqb Gi Rb¨ 17 AvMó mivr¨ ‡k †evqv wtôvib Nlìb nBqv‡Q Zvnv‡Z I miKvi‡i UbK bto bvB| ZLb etj ‡h, GLb nB‡Z RR, cwjk cÖvmb Gi Dci †evqvmgjvKiv nBtj Bmjvgx AvBb ev¯evqb mnR nB‡e| Av‡ivDi ingvb mvb Ges Ave`¨ gv AvDqvj ZLb AvgRv ‡K etj ‡h, AvgRv¨ fvB Avcvb ewikvj wfwMi Gi cÖvb| Avcvb ejv ‡h, ‡Kv_vq †evqvmgjvKivmnR nB‡e| Rei‡e AvgRv¨ fvB etj ‡h, †mme RvqMvNvjqv †¨ ‡Lqv‡Q ewikvj wfwMiSvjKvi Ges ei¸bvq †evqvmgjvKivmnR nB‡e| ZLb kvqL Ave`¨ gngb mjnM gZ †evqvmgjvKivi Rb¨ AvgRv ‡K ‡¨‡R †¨ q| AvnvNlvi †ekxvgvëiv Kwiqv †bZv„¨ ivPjqvinq|Ó**

The witness identified the aforesaid five accused present in dock i.e. the present petitioners except petitioner Mamun. He also deposed that in the newspaper he read the news about the death of two judges out of bomb explosion. Seeing the picture of Mamun therein he could identify easily that the man who was also present in the aforesaid meeting was Mamun and the said Mamun was identified on dock. In cross-examination he admitted that the proceeding of the meeting was not recorded. He denied that he did not see Shaiakh Adbur Rahman in the meeting or that he was not present in the meeting. In cross-examination he also reiterated that he saw Bangla Bhai in the meeting. He did not remember the date of the meeting. He stated in cross-examination that the meeting was attended by 10/12 persons including Mamun and (1) Shaiakh Abdur Rahman, (2) Bangla Bhai, (3) Md. Ataur Rahman @ Tariq Ibne Abdullah Sani, (4) Abdul Awal, (5) Md. Iftekhar Hasan @ Al Mamun and (6) Md. Faruk Hossain Khan @ Faruk @ Khaled Saifullah @ Amjad (all other six petitioners). He denied that he did not see the accused in the meeting or that deposed falsely.

P.W.3 Md. Abul Khair deposed that he was Imam of a mosque situated at Ruptali Mirdha Bari and that in March 2005 one Moulana Miraz came to him to get information about the owner of the house hanging a signboard "To-let" and in reply he told that owner of the house stayed at Dhaka

and one Md. Nazmul Huda Liton (P.W.7) was the caretaker and then he went to Liton along with the man and the house was rented to the said person @ Tk.1000/- as monthly rent and the name of another person coming with Moulana Miraz was disclosed to be Mehdhi and that they were in the house for about one and half months and that he learnt from Liton that thereafter they fled away without paying the rent and that after occurrence of bomb blast at Jhalakati, police took Mamun to the said house and seeing him the witness could identify the person to be one of the inmates of the said rented house. In cross-examination he stated that he saw Mamun about 3 to 4 times before the occurrence and denied the suggestion that he did not see Mamun or that he himself was a member of J.M.B and that he advised the accused to kill the Judges.

P.W.4 Pallabi Mukharjhee is wife of deceased Judge Jagannath Parey who narrated the prosecution case as already mentioned before and was not cross-examined.

P.W.5 Rawsan Ara Begum deposed that a boy named Shaon took her house on rent and that along with him another boy disclosing his name to be Shehab @ Mamun also used to reside with him in the house and that after 25th Ramadan aforesaid Shehab @ Mamun was not traced out and that on query Shaon told her that Mamun left for his home to attend his ailing father. She deposed further that after the occurrence leading to killing of two Judges police went to her house and showed her Shehab @ Mamun whom he recognised and identified as aforesaid Mamun residing in her house and she also identified accused Mamun on dock.

P.W.6 Md. Serajul Islam the imam of Rupatali Jame Mosque in his evidence corroborated P.W3 Md. Abul Khair regarding letting out of the house at Rupatali Laldegi Mirdha Bari to Shaon.

P.W.7 Md. Nuzmul Huda Liton in his evidence corroborated P.W.5 about letting out the house and identified accused Mamun on dock.

P.W.8 Uttam Kumar Das in his deposition identified accused Mamun to be a person residing in the house at Mirdha Bari and also identified him as such on dock.

P.W.11 Badsha Mia is a vendor selling milk to various persons visiting their houses. He deposed that on 14.11.2005 at about 8.45 A.M. while after delivering milk in the house of Judge Abdul Awal and a lady Magistrate he was coming out therefrom he found a person talking in front of the house of Judge Abdul Awal and then Mannan (PW14) was also standing in front of the house of Judge Abdul Awal and he heard sudden sound and he himself was injured with splinter of bomb exploded there and being thus injured he was taken to Jhalakati and from there to Barisal Hospital and that the man whom he saw in front of the house of Judge Abdul Awal with a bag in his hand was named Mamun and he identified him on the dock. In cross-examination he replied that except Mamun he did not know other accused

P.W.12 Md. Shamim Bahar supported the evidence of P.W.2 in toto deposing, inter-alia, **Bmjvgx `tji †hZvivAwntj AvgtK cwiPq KiwBqvwite ejqvetj Ges AvgtK _vKtZ etj | wKQ|h c‡i †hZe¨, Awm Zvnt` i bvg †kL Ave`y ingvb, evsjv‡`k, AvZ¥Di ingvb mvb, Awój AvDqvj, AvgRv` I i‡d Lvtj` mvDj-vj AvgRv` ewikvj wfwMGi †hZv| wKQyqvq c‡i AvtiK Rb †jvK Awm| Zvni bvg †gvj-vIgi| wKQyqvq c‡i wgwsi"i"nq| wgwsG kvqL Awój ingvb I evsjv‡`k etj †h mivt` tk Bmjvgx AwBb Pjy Rb¨ †h †evgvmgjv nBqv‡Q Zvnt`Z niKvi Gi †Kvb †PZbvmq bv‡B| GLb nBtZ RR, g¨vR‡bUt` i Dci Ges Av`vjtZ †evgvmgjv Kvtj niKvi Gi †PZbvnBte ejqv Zvnivetj | mvb I AvDqvj ZLb AvgRv` tK wRÁvmv K‡i †h, ewikvj wfwMi †Kvb RvqMq †evgvmgjv Kivmn nBte? ZLb AvgRv` mvne etj †h, †mmivwfwMi‡`i qvt` wkqv‡Q| SyjKvlxevei _vbv †Rjvq †evgvgvivmn nBte| ZLb †kL Awój ingvb I evsjv‡`k Bmv AvgRv` mvne‡K**

ïbï R†q Zvni mpavgZ Sy‡Kvbkevei ¸bq †egvmgjvKiv Rb¨| Zvni ci Avãj ingb, evsjv‡`k cÖ‡Pqvhq| †kL Avãj ingb, evsjv‡`k, AvZ¥Di ingb mvb, AvDqj, AvgRv`vi wmivKvÏbvq Av‡Q|

Only cross-examination put to this witness is **ÒAvg †h wgwbs G Dcw¯Z wØjvg Zvni ZvwL Avq ejv‡Z cvi bv|Ó** So his evidence goes unchallenged and thus is taken as admitted by the accused.

P.W.14 Abdul Mannan Howlader in his deposition corroborated P.W.11 Badsha Mia fully and deposed that accused Mamun had a bag in his hand who showed a paper to Judge Sohel Ahmed and then he threw the bag inside the vehicle carrying the Judges as a result of which bomb was exploded injuring him with splinter and killing the two Judges Jagannath Parey and Sohel Ahmed.

P.W.16 Md. Sabir Hossen is the owner of a shop near Chadkathi Ebadullah Mosque who deposed that on 14.11.2005 at about 8 to 8.15 A.M. while he was sitting in his shop a man came there with a bag in his hand and purchased banana and bread from him and the witness left the shop keeping his brother Md. Jubayer P.W.17 in the shop asking him to take Tk.8/- from the man and after a while he heard big sound, on hearing which he came out of his house and saw many persons in front of the house of Judge Abdul Awal and later saw in the paper that Judges Sohel Ahmed and Jagannath Parey have been killed by the bomb blast and Badsha was also injured and on seeing the picture of the other injured person he identified him to be the man who purchased banana and bread from him and the said person was recognised as accused Mamun whom he identified as such on the dock.

P.W.41 Md. Safiq Anwar, Metropolitan Magistrate, Dhaka deposed that on 24.11.2005 he recorded the confessional statement of accused Md. Iftekhar Hasan @ Al-Mamun under Section 164 of the Code of Criminal procedure.

P.W.44 Munshi Atiqur Rahman after conclusion of the investigation submitted charge sheet against the accused as already mentioned above.

After recording the evidence the learned Additional Sessions Judge examined the accused petitioners under Section 342 of the Code of Criminal Procedure. In reply to which the petitioner Shaiakh Abdur Rahman stated, inter-alia, **ÒAvgiv evsjv‡`k Gi cÖwZ AvBb gvb bv| Avg Avj-vni AvBbi wPi PB| Avgvi gtZ Avq ïbï ¯'| AvgivG †`‡ki cÖwZ AvBbi wi‡× Ae¯'b wbtqvB| AvgivG‡`‡ki wPiK, cwjk G‡`i nZ¨vi Rb¨ wm×vš—wbqvB| Avq Avj-vn Gi ïbï Rbvgt‡Z `j Mb K‡iB I nZ¨vi ïbï R wqtQ|Ó**

Similarly accused Siddique Bangla Bhai stated that he felt himself proud being a member of **ÔgRyj¤^k mÿÕ**(JMB) and he also did not deny the allegation against him. Accused Khaled Saifullah stated, inter-alia, **G †`‡ki miKvi hvivAvmbZ Zv‡`i m¤úK©vjdtjU wZiY K‡i Bmjvgx AvBb Pyj †Póv K‡iB cÖ‡i Avgivnvi¨ ¿xRmv Gi c_ Aej¤^b K‡iB| kvtqL Avãj ingb Gi ïbï ¯^x Avq Sy‡KvtïZ †egv mgjvi mvMb I `ªRb wPiK nZ¨vKi‡Z †c‡i Avq Mvb|Ó**

Accused Mamun in his statement admitted that under order of Shaiakh Abdur Rahman and under the leadership of Khaled Saifullah he killed the two Judges.

Md. Ataur Rahman Sani also in his statement did not deny the prosecution case and stated that due to prevalence of corruption and absence of Islamic law in the country, he felt compelled to wage zihad. Accused Abdul Awal stated that he was a muslim mujahid and to fulfil the demand of his iman he resorted to the path.

After concluding the trial, the learned Additional Sessions Judge recorded judgment of conviction and sentence on 29.05.2006 as already mentioned above.

Hence are these petitions.

Mr. Khalilur Rahman, the learned State defence Lawyer represented the petitioners in Jail Petition Nos.7,8 and 9 of 2006 preferred by condemned prisoners (1) Shaiakh Abdur Rahman Ibne Abdullah @ Easa @ Moulana Abdur Rahman, (2) Md. Siddiqul Islam Pramanik/alias Azizul Islam/alias Omar Ali alias Litu Miah alias Bangla Bhai and (3) Md. Ataur Rahman alias Tariq Sani Ibne Abdullah respectively.

Placing the materials on record including the impugned judgment, the learned Advocate submits that the petitioners have been convicted on the basis of emotion having no evidence warranting their conviction.

He further submits that the witnesses deposing against his clients are procured witnesses and they in fact did not see any occurrence and deposed falsely at the instance of the police. Being confronted as to what prevented his clients from cross-examining the witnesses and/or even denying the prosecution case in so many words, the learned Advocate found it difficult to answer and of course submitted that the petitioners were not defended properly in the trial court.

He however submits that this court being the highest court of the country could consider the facts and circumstances and exercise the jurisdiction and acquit the petitioners as there was no cogent evidence against them.

Mr. Salahuddin, learned Advocate represented the petitioners in Jail Petition Nos.04 of 2006 and 10 of 2006 namely, Md. Iftekhar Hasan @ Al-Mamun and Md. Abdul Awal @ Arafat @ Samad @ Asif respectively.

He adopts the submissions made by Mr. Khalilur Rahman and submits that there has not been adequate legal assistance to the petitioners and as such the case has not been properly conducted in the trial court.

He however emphasizes that this court in its jurisdiction to do complete justice may look into the materials which if examined thoroughly would reveal that in fact the prosecution case could not be proved against the petitioners beyond shadow of doubt and as such they are entitled to acquittal.

Mr. M. Shamsul Alam, learned Counsel appearing for the petitioner in Criminal Petition for Leave to Appeal No.444 of 2006 preferred by condemned prisoner Md. Faruk Hossain Khan @ Faruk @ Khaled Saifullah @ Amjad has taken us through the impugned judgment and submits, inter-alia, that there is at all no direct or indirect evidence to implicate his client with the charge under Sections 302/34 of the Penal Code and as such he is entitled to clean acquittal of the said charge.

Regarding conviction under Section 120B of the Penal Code the learned Counsel submits that out of 44 witnesses produced by the prosecution only two witnesses, namely, P.W.2 Md. Anisur Rahman and P.W.12 Md. Shamim Bahar deposed as to taking part of his client in criminal conspiracy but the said two witnesses are not natural witnesses and in fact they have been procured by the police and the prosecution totally failed to prove that his client was party to any criminal conspiracy for committing the alleged offence of killing the two Judges and as such the conviction under Section 120B of the Penal code cannot be maintained at all against his client.

He submits thereafter that the defence being not conducted properly the petitioner has been deprived of adequate legal assistance.

Referring to the statement of his client made in his examination under Section 342 of the Code of Criminal Procedure the learned Counsel submits that the inculpatory portion of the statement under no circumstances can be the basis of his conviction and that apart from such alleged statement of the accused the prosecution is bound to prove the charge beyond shadow of doubt producing unimpeachable evidence and in the present case, according to the learned Counsel, the prosecution simply failed to discharge the onus and as such the order of conviction and sentence is liable to be set aside.

He further submits that admittedly the name of the petitioner is not in the FIR and no allegation has at all been made against him in the said FIR.

According to the learned Counsel, not a single witness deposed against the petitioner as to his involvement in the alleged murder of the two Judges and as such conviction under Sections 302/34 of the Penal Code falls through at once.

Referring to the charge of criminal conspiracy against the petitioner the learned Counsel submits that even according to prosecution P.W.2 Md. Anisur Rahman and P.W.12 Md. Shamim Bahar are the only witnesses produced by the prosecution to the effect.

He thereafter submits that P.W.2 hails from Barisal while P.W.12 hails from Jhalakati and both of them have been procured by the police to depose in the case implicating the petitioner.

He advanced grievance of failure of the investigating agency to search the P.O. (place of occurrence) of the alleged conspiracy and submits that in the meeting of such a grave nature conspiring to kill the Judges, it is not believable that the two outsiders i.e. P.Ws.2 and 12 would be allowed to attend and as such their evidence is neither believable nor acceptable and relying on their evidence, the petitioner cannot be convicted for alleged criminal conspiracy and as such the order of conviction and sentence is liable to be set aside.

Mr. Abdur Razzaque Khan, learned Additional Attorney General appearing on behalf of the State submits, inter-alia, that in view of the statements made by the petitioners in reply to the charge, in their statements under Section 342 of the Code of Criminal Procedure and confessional statement of condemned petitioner Md. Iftekhar Hasan @ Al-Mamun (the petitioner in Jail Petition No.06 of 2006) admitting the guilt, disowning the existing law of the land and also even denying the jurisdiction of the court of the country, the plea raised on behalf of the petitioners before this court for doing complete justice does not arise.

Placing the provisions of Articles 103 and 104 of the Constitution, the learned Additional Attorney General submits that Article 103 of the Constitution is invoked if any point is found in the impugned judgment involving substantial question of law.

He further submits that in view of clear indication of the petitioners (except the petitioner in Jail Petition No.444 of 2006 and Jail Petition No.04 of 2006) disowning jurisdiction of this court question of raising the plea of getting complete justice from this court does not arise and referring to the materials on record the learned Additional Attorney General submits that the plea of getting complete justice is not warranted in a case like this in which there are clear admissions of the guilt by the petitioners in their replies to the charges, statements under Section 342 of the Code of Criminal Procedure and in the case of petitioner Mamun in Jail Petition No.04 of 2006 in his aforesaid confessional statement and further, failure even to cross-examine the prosecution witnesses proving the charge to the hilt.

He refers to the seizure list dated 14.11.2005 marked as exhibit-15/1 and submits that from the house, the place of occurrence of the conspiracy, 31 items were seized on 16.11.2005, within two days of the occurrence which included a number of books containing exciting message for movement to introduce Islamic law, registers of delegates, plastic box, a number of PBC pipes, sunlight battery, a piece of glass, green wire etc. and thereafter he submits that from the nature of the articles it goes beyond doubt that the evidence of P.Ws.2 and 3 as to making conspiracy in the house for the murder by bomb explosion by the petitioners has been established.

Thereafter referring to the evidence of P.W.2 the learned Additional Attorney General submits that his evidence clearly proved involvement of the petitioners including the petitioner of Petition No.444 of 2006 that they were involved in the conspiracy resulting in the murder of the two Judges. P.W.2 though was cross-examined, his evidence could not be shaken at all. He then submits that though P.W.12 in his evidence corroborated P.W.2 in toto, he was not at all cross-examined even denying the vital part of the evidence against petitioners and as such the submissions of Mr. Alam, according to the learned Additional Attorney General, are of no use. Regarding other petitioners, according to the learned Additional Attorney General, nothing could be represented by the learned Advocates appearing for the accused to hold that their conviction has been unfair or illegal in any way. Moreso, in view of their statements, quoted above and their failure to cross examine the witnesses, thereby admitting the evidence against them the order of conviction cannot be found fault with. He reiterated that the petitioners amongst others were present in the meeting making the conspiracy as already mentioned above. He thereafter submits that the petitions are liable to be dismissed.

The learned Additional Attorney General submits that the two victims had no enmity with the petitioners and still they have been done to death by the petitioners and the reason indicated by the petitioners is nothing but a mad cry to establish alleged Islamic law in the country. In this view of the matter, according to the learned Additional Attorney General, the sentences imposed against the petitioners are absolutely justified.

Lastly he submits that it appears from the record that either the trial court or the High Court Division did not fail to exercise their jurisdiction or did not commit any error or illegality whatsoever in the judgment and as such the petitions have no leg to stand and are therefore liable to be dismissed.

We have considered the submissions made at the Bar and perused the materials on record. Out of 7 convicts one of them namely Asadul Islam @ Arif being in abscondence did not prefer any petition and so there are 6 petitioners before us filing six petitions as mentioned above. During trial the petitioners were asked to reply to the charge of entering into criminal conspiracy as a result of which two Judges namely Shohel Ahmed and Jagannath Parey have been killed on 14.11.2005 at Purbachandkathi, Jhalakati committing thereby offences publishable under Sections 120B and 302/34 of the Penal Code. Prosecution produced 44 witnesses in support of the charge. P.W. 1 Md. Sultan Ahmed Khan, Driver of the Judgeship of the Jhalakati is the informant of the case who in his evidence narrated the occurrence as already mentioned by us herein before. He stated that petitioner Mamun was found by him carrying a bag in his hand before the occurrence who was again found after the occurrence lying on the road near the place of occurrence with injuries on his person out of bomb explosion whose name was later disclosed as Mamun and that some leaflets were also found from his possession wherein it was written **Ögybe i‡Z Avšb gvb by**

†KuAvbi Avb PjyKiÖRqqZj †gvRvnvb, evsjv‡`k|Ó and the witness identified the accused petitioner Mamun on dock.

P.W. 2 Anisur Rahman in his evidence deposed that he attended a meeting held in a house at Rupatali Laldigirpar, Mirdha Bari which was attended, amongst others by Mamun and all other petitioners i.e. (1) Shayekh Abdur Rahman, (2) Bangla Bhai, (3) Ataur Rahman Sani, (4) Abdul Awal, and (5) Khaled Saifulla. Similarly P.W. 3. Md. Abul Khair, P.W. 5 Rawsan Ara Begum, P.W7 Md. Nazmul Huda Liton, P. W. 8 Uttam Kumar Das, P. W. 16 Md. Sabir Hossen, P.W. 17 Md. Jubayer, P. W 18 Md. Eklas Mia and P. W. 20 Md. Tarek Hossen all in one voice deposed disclosing involvement of petitioner Mamun in the meeting of conspiracy and also in the occurrence itself resulting in the murder of the two Judges. In this connection P. W. 11 Badsa Mia and P. W. 14 Abdul Mannan Hawlader, both injured in the bomb blast, in their evidence made categorical statements that the petitioner Mamun exploded the bomb inside the vehicle resulting in the death of two Judges. In answer to his examination under Section 342 of the Code of Criminal Procedure Mamun admitted to have committed the offence and stated that he felt proud being able to kill the two Judges. In his confessional statement recorded under Section 164 of the Code of Criminal Procedure Mamun again admitted that according to premeditated plan of his leaders Abdur Rahman, Bangla Bhai he committed the occurrence at Jhalakati. It may be mentioned that while P. W. 41 Md. Safiq Anwar, learned Metropolitan Magistrate, Dhaka deposed to prove the aforesaid confessional statement Mamun did not deny the statement nor even made any suggestion challenging the vouluntanness or truthfulness of the statement. The aforesaid confessional statement and the clear admission made by the petitioner Mamun in his examination under section 342 of the Code of Criminal Procedure coupled with evidence on record therefore clearly proves prosecution case against him.

Let us now quote Section 120B of the Penal Code which is as under

"120B-(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, (imprisonment for life) or rigorous imprisonment of a term of two years or upwards shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

. . . ."

In this connection Section 120A of the Penal Code, defining criminal conspiracy may also be mentioned which runs as follows:

"120A. When two or more persons agree to do, or cause to be done,-

(1) an illegal act, or

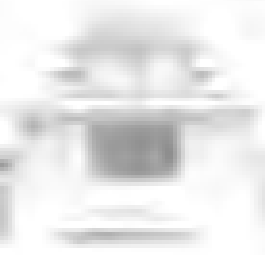
(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

From the evidence of witnesses specially P.Ws.2 and 12 as mentioned already it is proved that two or more persons i.e. petitioner Mamun along with other petitioners, held meeting and conspired to blast bomb upon the Judges and others in the administration resulting in the murder of the two Judges and petitioner Mamun being one of them, his action comes within the mischief of offence punishable under Section 120B of the Penal Code as well. Moreover from the evidence of witnesses, specially P.Ws.1 (informant), 11 (Badsha Mia) and 14 (Abdul Mannan Howlader) the

offence of killing the two Judges by him has been well proved and as such his conviction under Sections 120B and 302/34 of the Penal Code cannot be found fault with. So the petition of the petitioner Mamun is found to have no substance at all.

Regarding other petitioners namely, (1) Shayekh Abdur Rahman, (2) Siddiqul Islam Bangla Bhai, (3) Ataur Rahman Sani and (4) Abdul Awal, the evidence of prosecution witnesses already mentioned above may be referred to. P.W. 2 Anisur Rahman, as already noticed, in his evidence clearly proved the holding of a meeting held at the house at Repatali Laldigirpar Mirdha Bari before the occurrence attended by, amongst others, the aforesaid petitioners. The witness deposed **wgwbi G emqvkwU Ave`y ingvb, evsjv‡`k e‡j †h, Bmjvgx A‡bK ev¯—evqb Gi Rb¨ 17 Avwfl©i mivmwi †k †evqv wcùvb Nvbv nBqv Zvnv‡Z Avi wKQzi UbK bZzb bv_| ZLb e‡j †h, GLb wRÁvmv RR, cwjk cÖvmb Gi Dci †evqvi mgjv Kiv nBqj Bmjvgx A‡bK ev¯—evqb mnR nB‡e| AvZvDi ingvb mvb Ges Ave`y AvDqvj ZLb AvgRv‡`i e‡j †h, †Kv_vq †evqvi mgjv Kiv mnR nB‡e| Revb AvgRv`i fvB e‡j †h †mB me RvqMv Nvjqv f¨ vkqv‡Q ewikvj wefv‡M Sv‡jK wkïiv Ges ei ¸bq †evqvi mgjv Kivi mnR nB‡e| ZLb kvqL Ave`y ingvb nvwdR gZ †evqvi mgjv Kivi Rb¨ AvgRv`i †K wb‡`©k †`q| Awa`ßi †ekxwgwK Kwiqv †bZzb ivPvi qvix| ivwZ Awg gv¯—evwmwZB Nyiv| †gvn¨ xfvB UKvbv¨ I qvq Kv‡Kiv cÖ wkÿvAvevi †`wk †h, Ntii ¯ iRvq Zvjv jvMvbv|Ó**
He thereafter identified the petitioners. In cross examination nothing tangible was brought out from this witness. Similarly P.W.12 Md. Samim Bahar corroborated evidence of P.W.2 in toto. Surprisingly enough, no suggestion even was given to this witness denying the conspiracy participated by aforesaid petitioners. The seizure list marked as Exhibit-15/1 of the articles seized from the house of conspiracy, the description of which has been given earlier goes to strengthen the charge of Criminal conspiracy of the petitioners in the house in question to commit the offence of bomb blast etc. In such view of the matter coupled with evidence of other witnesses as already mentioned hereinbefore in the evidence of these two witnesses (P. Ws. 2 and 12) the charge against the aforesaid petitioners in entering into criminal conspiracy resulting in the death of the two Judges has been proved beyond shadow of doubt. Moreover in their reply to the charge and in their examinations under Section 342 of the Code of Criminal Procedure, none of them denied the prosecution case and rather admitted to have committed the offence. The above mentioned clear admissions of the petitioners together with the categorical statements of witnesses made in their deposition disclosed clearly the participation of the petitioners in the offence of criminal conspiracy that resulted in the murder of the two Judges. In such view of the matter it is crystal clear that the prosecution has been able to prove the charge against the aforesaid petitioners beyond shadow of doubt. The petitions of the petitioners namely, (1) Shayekh Abdur Rahman, (2) Siddiqul Islam Bangla Bhai, (3) Ataur Rahman Sani and (4) Abdul Awal are thus bereft of any substance.

Let us now consider the case of Md. Faruk Hossain Khan @ Faruk @ Khaled Saifullah @ Amjad, petitioner in Criminal Petition No.444 of 2006 who has been represented by Mr. M. Shamsul Alam, learned Counsel. It is true that his name does not find place in the First Information Report. The First Information Report was lodged by P. W. 1 Md. Sultan Ahmed Khan who witnessed the occurrence at the very time of occurrence who saw the petitioner Mamun with injuries on his person on the spot on whose possession some incriminating leaflets were found. He is a witness of the occurrence of bomb blast and as such he mentioned the name of only accused Mamun in the First Information Report and the name of the present petitioner Faruk Hossain could not be mentioned. There is therefore no reason to have adverse inference for the omission. It may



Except Md. Iftekhar Hasan @ Al-Mamun and Md. Faruk Hossain Khan, the petitioner in Jail Petition No.04 of 2006 and Criminal Petition No.444 of 2006 other petitioners have not sought justice from this court. It may be mentioned that all citizens of this country are bound by law of this country. Section 2 of the Penal Code provides for trial of any Bangladeshi according to the provision of the said Code for any act done by him. Under Section 5 of the Code of Criminal Procedure, all offences under the Penal Code shall be tried in accordance with the provisions of the Code of Criminal Procedure. Under Article 101 of the Constitution the High Court Division shall have jurisdiction, powers and functions as are or may be conferred on it by the Constitution or any other law. The urge of the petitioners to get their matter disposed of by the High Court Division or by this Division through Islamic law has got no leg to stand in view of the aforesaid provisions. Under Article 152 of the Constitution the word "law" means any Act, Ordinance etc. having the force of law in Bangladesh. The urge of the petitioners for trying their cases in

Khaled Saifullah @ Amjad other condemned prisoners having failed to raise any substantial question of law do not deserve any consideration and interference by this court with regard to their conviction and sentence passed by the learned Sessions Judge, Jhalakati and maintained by the High Court Division.

Elaborate fact of the case has been stated in the main judgment and I refrain from making any repetition in the interest of brevity of the judgment. Condemned Prisoner Md. Faruk Hossain Khan @ Faruk @ Khaled Saifullah @ Amjad has only sought for interference with his conviction and sentence by this court by filling Criminal Petition for Leave to Appeal No.444 of 2006 Rest of the condemned prisoners, namely (1) Md. Iftekhar Hasan @ Al-Mamun, (2) Shayekh Abdur Rahman Ibne Abdullah @ Ehsan @ Maolana Abdur Rahman, (3) Md. Siddiqul Islam @ Azizul Islam @ Omar Ali @ Litu Miah @ Bangla Bhai, (4) Md. Ataur Rahman @ Tariq Sani Ibne Abdullah and (5) Abdul Awal @ Arafat @ Samad @ Asif have not filed any criminal petition for leave to appeal and they only filed jail petition admitting their guilt (particulars of which are stated in the main judgment) stating in effect that they are not liable to be tried under the law of the land and by the courts established thereunder. They however claimed to be tried under the Islamic or the Sharia law and by the courts established thereunder. One thing has been found common in them that all the aforesaid condemned prisoners except Md Faruk Hossain Khan having admitted the offence denounced and renounced the jurisdiction of the court as well as the conviction and sentence passed by it against them.

In this background of the case, the learned Additional Attorney General has sought to argue that since the offence has been admitted by the said condemned prisoners they should not be considered to have raised any substantial question of law by filing the aforesaid jail petitions warranting interference with their conviction and sentence passed by the court below and affirmed by the High Court Division.

In this context, it is pertinent to mention that these condemned prisoners not only took up aforestated stand before this court but they also took the same stand during their trial before the court of the Sessions Judge, Jhalakati and also before the High Court Division of the Supreme Court. But both the courts below engaged State defence counsel for the condemned prisoners to defend their case pursuant to Chapter 12 of the Legal Remembrancer's Manual. Even this court in the light of its Rules has also caused appointment of the State defence counsels for these condemned prisoners to defend their case. These go to show that despite the aforesaid stand taken by the condemned prisoners both the trial court as well as the High Court Division did not abandon them and refrain from holding a trial as per law of the land and they were therefore rightly tried in accordance with law for the offence charged in view of section 2 of the Penal Code and section 5 of the Code of Criminal Procedure.

Since the above condemned prisoners by filing jail petitions raised jurisdictional point by reiterating their earlier plea that courts under the law of the land did not have the jurisdiction to try them, they should be deemed to have challenged their conviction and sentence and thus to be considered to have raised substantial question of law warranting this court to look into and examine the propriety and illegality of their conviction and sentence passed by the courts below. This is all the more necessary and required in view of the fundamental right guaranteed to them as enshrined under Article 31 of the Constitution that no action detrimental to the life, liberty and body shall be taken against any citizen except in accordance with law. Article 31 of the Constitution

guarantees protection of life and liberty to every citizen. The term cannot be confined only to taking away of life, but it means something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed.

6.2 National Tea Company Limited Versus The Deputy Commissioner, Hobiganj and others

PRESENT

Mr. Justice Md. Ruhul Amin
Chief Justice
Mr Justice Mohammad Fazlul Karim
Mr. Justice M.M. Ruhul Amin

CIVIL APPEAL NO. 47 OF 2001

(From the Judgment and Order dated January 19, 2000 passed by the High Court Division in Writ Petition No. 3827 of 1998,

National Tea Company Limited Versus The Deputy Commissioner, Hobiganj and others.

Date of hearing : The 5th September, 2007

J U D G M E N T

MD RUHUL AMIN, CJ

The appeal, by leave, has arisen out of the judgment and order dated January 19, 2000 of a Division Bench of the High Court Division in Writ Petition No. 3827 of 1998 discharging the Rule.

The writ petition was filed impugning Memo No. AJRPOHO/REVENUE/JA:MA/14/6/11/98-1958 dated 01.11.1998 issued by the Respondent No.2 purportedly granting lease of Balumahal locates within the writ petitioner's Tea Estate (Annexure -"A") in favour of the respondent No.4 and Notification No. AJRPOHO/REVENUE/JA MA/14/6/2-2(4)/98-68 dated 22.04.1998 issued by the Respondent No.1 demarcating and declaring part of the petitioner's Tea Estate as Balumahal (Annexure- 'A(1)').

Facts in the background whereof the writ petition was filed, in short, that the writ-petitioner-appellant is the public limited company and carrying business of plantation, cultivation, production and processing of tea and other allied products, the appellant and the Deputy Commissioner, Habiganj entered into an agreement on March 19, 1988 and thereof the appellant was granted lease of Chundeecherra Tea Estate for a period of 35 years for the purpose as stated

hereinbefore, the Government on July 15, 1978 transferred 12 Tea Estates to the appellant which also includes the above mentioned Tea estate and the appellant by the aforementioned agreement became the absolute owner in possession and control of the estate. The appellant came to know that on April 22, 1998 the Additional Deputy Commissioner (Revenue), Habiganj demarcated and declared part of aforementioned Tea Estate as Balumohal and in pursuance of that the Deputy Commissioner, Habiganj invited tender to grant lease of the Balumohal which locates well within the appellant's tea estate. The appellant raised objection through its representation on May 11, 1998 to the Deputy Commissioner, Habiganj and also to the Divisional Commissioner upon referring to the Memo No. Land-7-Misc.-63/97/179 (6) dated June 29, 1998 issued by the Ministry of land wherein it was clearly spelt out that lease of Balumahal cannot be given to any outsider other than the Tea Estate, that inspite thereof the Additional Deputy Commissioner (Revenue) (Respondent No.2) by the order dated November 1, 1998 granted lease of Balumohal to the respondent No.4-Shamim Ahmed for the year 1405 B.S.

As against the said action the appellant moved the High Court Division in writ jurisdiction impleading the respondents and obtained Rule.

The Rule was opposed by the respondent No.4

It was contended on behalf of the writ petitioner-appellant that he is the lessee of the Chundeecherra tea estate for 35 years and as per terms of the lessee deed the respondent Nos. 1 and 2 have no authority to lease out the property of the appellant to some other persons, that on the basis of lease the appellant has acquired vested right in respect of the property of the tea estate and as such the same cannot be taken away during the period of lease by grating lease to some other persons for collection of sand from the appellant's property, that the respondent Nos. 1-3 are competent only to control any part of the Tea Estate on discovery of mineral resources in the light of the Clause 17 of the agreement and that lease to the respondent No.4 having been given for the purpose other than as in Clause 17 of the agreement as because sand does not come within the definition of 'Mineral' and as such the said respondents cannot enter into an agreement or allow a third party for collection of 'Sand' from the Tea Estate which is the property of the appellant.

It was the contention of the respondent No.1, that the respondent No.1 has invited tender for leasing out Balumohal inside the tea Estate as per instruction of the Ministry of Land, that the writ petitioner and others participated in the auction and the respondent No.4 being the highest bidder lease of the Balumohal was granted to him for the year 1405 B.S., that in the lease agreement between the writ petitioner and the government it has not been mentioned that the government will have no right to grant lease of Balumohal inside the Tea Estate to outsider, that there was a meeting at the initiative of the Ministry of Land wherein Tea Garden owners and the representative of the Tea Association and the representative of the Ministry of Commerce were present and the Ministry of Land in the light of the decision of the government made proposal to the Tea Garden owners for leasing out the Balumohal and the said proposal was not accepted and the Ministry of Land also rejected the proposal of the Tea Garden owners for leasing out the Balumohal for a token amount and in the background of the aforestate of the matter the government invited tender for leasing out Balumohal, that the writ petitioner being aware of the government decision for leasing out the Balumohal by inviting tender did not raise any objection and the said behaviour of the writ petitioner amounts to waiver on their part and as such the contention that the tenders were invited without hearing and notice to the writ petitioner is not correct.

The respondent Nos. 1-3 did not file any affidavit-in-opposition, but at the time of hearing a Law Officer of the Government appeared for the said respondents.

The High Court Division discharged the Rule upon observing "From the aforesaid annexures we are of the view that the petitioner company was very much aware of leasing of the Balumohal inside the Tea Estate of the petitioner company, the petitioner company thus accepted the authority of the respondent No.1 regarding the right to lease out Balumohal inside the Tea Garden and admitted the ownership of the government thereof since 1992 as found form the various annexures referred to above and as such the petitioner company acquired no vested right in the Balumahal.

Now from the reading of the contents of Annexure-1 of the affidavit-in-opposition of the respondent No.4 it is very clear that the government being the owner of the Balumohal (offered to the petitioner company to take lease of the Balumohal) at the 10% enhanced rate than that of the previous rent but the representative of the petitioner company expressed their unwillingness and they, wanted to take the lease just at a token price to which the government did not agree and the tender notice was issued and subsequently granted the lease of Balumohal in favour of the respondent No.4. We therefore hold that the impugned Annexure-A and A(1) can not be declared to have been issued without any lawful authority inasmuch as the petitioner company had already waived their right and conceded the said granting of lease to third party".

Leave was granted to consider the submissions that in terms of the lease granted by the Government in favour of the company the entire property covered by Chundeecherra Tea Estate belong to the company and actual possession was delivered to the company and they are enjoying the same and at that stage a notification was issued by respondent No.2 for leasing out an alleged Balumohal which is situated within the tea estate and that it being not a mineral product can not be done in view of the agreement and as such the act complained by the appellant is illegal, arbitrary and without lawful authority, that the company acquired a vested right in the said Chundeecherra Tea Estate which can not be interfered with by granting lease to respondent No.4 for collection of sand from the appellant tea estate, that if mineral resources are found inside the tea estate in that case the respondents may control any part of the estate but not otherwise and said provision was included in Clause 17 of the agreement dated 19.3.1988 but in the present case lease has been granted to respondent No.4 for the purpose other than as stated in Clause 17 of the said agreement as collection of sand does not come within the definition of mineral for which the respondent can enter into or allow any third party to enter into the tea estate for this purpose, that illegality has been committed by the High Court Division in holding that respondent Nos. 1-3 have authority to lease out the so called Balumohal without realizing that the petitioner is the lawful lessee under the provision of the state Acquisition and Tenancy Act 1950 and its vested right as lessee can not be affected in such manner unless Clause 17 of the lease deed is attracted, that the High Court Division has not given any decision as to Clause 17 of the lease deed under which the Government is authorized to lease out the mineral resources found beneath the surface and other than that it has no power to allow any person to collect ordinary sand from the so called Balumohal of the tea estate more so when there is no such Balumohal in the said tea estate, that the area from where sand is to be collected is within the control and management of the tea estate and if a third party is allowed to enter in the tea estate area for any other purpose the industry will suffer and there may arise complications and the High Court Division failed to appreciate this factual aspect of the matter.

At the outset it has been submitted by the learned Counsel for the appellant that after the expiry of the lease period i.e. lease for the year 1405 B.S. granted to the respondent No.4 the Government has not leased out the Balumohal for any further period and in that view of the matter though apparently it may be argued by the respondents, particularly the respondent No.4, that this appeal has become infructuous or in other words the hearing of the appeal on merit and disposal thereof in either way is academic, is not wholly correct, since the other point involved in the appeal needs to be decided for the future or in other words the appeal needs to be disposed of upon deciding the points, other than the one as mentioned above, raised in the appeal.

On going through the leave granting order we are of the view that the submission of the learned Counsel for the appellant for disposal of the appeal upon deciding the points, other than the one mentioned hereinbefore, raised in the appeal to avoid complications in future appears to be of merit.

The learned Counsel for the appellant has submitted that the High Court Division was in error in not considering the lease deed dated March 19, 1988 as well as the schedule of the said deed where admittedly there is no Balumohal within Tea Estate in question which has been leased out to the appellant and in that view of the matter leasing out of the appellant's land by the government treating same Balumahal was illegal. It has also been submitted that the High Court Division was in serious error in not holding that the appellant has acquired vested right to own and possess the land as treated by the respondents Balumohal if any within the Tea Estate on the basis of the lease deed dated March 19, 1988 executed by the government, unless the provision of Clause 17 of the lease deed is attracted.

The undenied provision is that the appellant is the lessee of Chundeecherra Tea Estate for 35 years on the basis of the lease deed dated March 19, 1988 and the Balumohal is within the aforesaid Tea Estate.

The government, as seen from Clause 17 of the lease agreement, reserved its right in respect of the properties as mentioned in the said Clause 17 of the lease deed inspite of the fact that the said properties are within Tea Estate of the appellant.

Clause 17 reads as follows:**ÔBRuiv wZvBRuiwb Rwgi Dcwi fMvevAf`šÍi nKj LbR nvwe /AvKwiK Gi AwaKvi Ges Zrmn Abjyc cÖKvkK nvwe wb Abyôvb, mvßvwn, Lbb, DËg b, cÖwnsl ¯ÍvšÍi-BZ¨vw` Kvh©gi Rb¨ cÖ qRbxq Ab¨vb¨ nKj nÖvMÖ nvwaiwi AwaKvi nvivq]Z i\tLb| GB nvwe i Dci BRuiv tii i †Kb AwaKvi _vKtebv Ges Zwai †Kb Avcwe l MÖY¡vMÖ nBtebÓ|**

From Clause 24 of the lease deed it is seen that the government reserved its right to have earth from the leased out land for the purpose as mentioned therein.

Clause 24 reads as follows: **BRuiwb Rvg nsj M\Kvb miKvixiv¯vwgwU l †givgtZi cÖqRtb gwU Awek¨K nBtj BRuiv vi Dwvwbv¶hZci¡Y cÖvb Kwt\Z ewa¨ _vKtebÓ|**

It is also seen from the Clause 21 of the lease agreement that in case leased out land or part thereof if is required for public purpose the lessee would be required to handover the said land to the lessor and the lessee would be entitled to get compensation. The other matters in the said Clause 21 of the agreement are not necessary for our present purpose. Clause 24 of the lease agreement is also not relevant to the subject matter of the appeal.

As seen from the schedule of the Tender published for leasing Balumahal in question and the lease Agreement dated March 19, 1988 land measuring 7.77 acres leased out to the respondent No.4 for

the year 1405 B.S. is within Chundeecherra Tea Estate. It appears from the schedule of the lease agreement dated March 19, 1988 entered into between the government and the appellant that Plots shown in the schedule of the Tender notice for leasing out Balumahal are also the Plots shown in the schedule attached to the lease agreement.

No case from the side of the Government has been placed before the Court that the land proposed to be leased out treating as Balumohal is outside the Chundeecherra Tea Estate or that outside the land described in the schedule attached to the lease agreement dated March 19, 1988 It may also been mentioned that no case was placed before the Court to show that the sand extracted from the Balumahal in question ÙLdR mfi Ó or in other words sand used for construction purposes is ÙLdR mfi /AvKwiKÓ|

The learned Counsel for the respondent No.4 in the background of the materials on record could not make out a case that the sand for the extraction whereof lease has been granted is mineral resource. It appears that the sand for extraction whereof Balumahal has been leased out is ordinary sand and used for construction purpose or for some other purpose allied thereto.

Because of the matters in Clause 17 of the lease agreement Government would be in a position to enter upon the land of Chundeecherra Tea Estate when there is mineral resources as well as similar kind of natural resources either on the surface or beneath the surface of the land of Chundeecherra Tea Estate and for the exploration, extraction and collection thereof can take necessary steps as reflect in Clause 17 of the lease agreement.

As no case was made out before Court that the sand that would be extracted by the respondent No.4 from the leased out Balumahal is mineral resources, in our view the government was not competent to lease out the land of the Chundeecherra Tea Estate to the respondent No.4 which has already been leased out to the appellant for 35 years by the lease agreement dated March 19, 1988. Since the appellant was the lawful lessee of the land of the Chundeecherra Tea Estate and as such the right so acquired by the lessee cannot be affected unless there are situations as contemplated in Clauses 17, 21 and 24 of the lease agreement present.

As stated hereinbefore on perusal of the schedule of the tender notice it is seen that the land that has been advertised for leasing as Balumohal is also the land as in the schedule attached to the lease agreement of the appellant. It has already been mentioned that no case was placed before the Court that the land advertised for leasing as the Balumohal is not part of the land of the Chundeecherra Tea Estate that has been leased out to the appellant or in other words that the land so advertised for leasing out as Balumohal is outside the land of the Chundeecherra Tea Estate leased out to the appellant.

In the aforestate of the matter we are of the opinion that unless the matters in Clause 17 of the lease agreement are present in respect of the land of Chundeecherra Tea Estate as leased out to the appellant or that there occurs situations as are in Clauses 21 and 24 of the lease Agreement the government during the lease period is not competent to enter upon the land that has already been leased out to the appellant and as such the action of the government i.e. leasing out the land inside the Chundeecherra Tea Estate treating the same as Balumohal had no legal sanction and hence the action taken by the respondent Nos. 1-3 was not legal.

It is seen from the Judgment of the High Court Division that the said Division as to the contention of the appellant relating to leasing out of the Balumahal has observed that the matter of leasing

out the land in question was known to the appellant and thereby accepted the authority of the government to lease out the land within Tea garden as Balumohal. It has further been observed by the said Division that since the appellant wanted to take lease of the Balumohal on token price but to that the government did not agree and by the said conduct the appellant "had already waived their right and conceded the said granting of lease to the third party".

It may be mentioned in the background of the point raised in the appeal there is no question of accepting the authority of the government to lease out land inside the Tea garden as Balumahal and thereby accepting or conceding to the action of the government as valid and that thereby there was waiver on the part of the lessee of the Tea garden, since the lessee's steps to take lease of the Balumohal on a token price, to which government did not agree, is not material and relevant in the background of the facts and the question calling for determination. The sole question is how far the Government in the absence of attracting the provisions of Clauses 17, 21 and 24 of the lease agreement in respect of the land of the Tea garden i.e. Chundeecherra Tea Estate is competent to lease out or dealt with the land so leased out during the period of the lease or in other words in leasing out to the third party the part of the land that has already been leased out to the appellant by the lease deed dated March 19, 1988 treating the same as Balumohal.

We are of the view in a case where matters as in Clause 17 of the lease agreement are present in the leased out land or in case of matter(s) as is or are in Clauses 21 and 24 of the lease agreement the Government would be competent to enter upon the lease out land and take over possession or to deal with the said land in the manner decided and in no other case the lessor, either describing the leased out land Balumahal or ascribing any other description to the leased out land, would be competent to enter into the land that has been leased out, as in the instant case by the lease agreement dated March 19, 1988.

In the background of the discussions made hereinabove as we find merit in the appeal, as such calls for interference with the judgment of the High Court Division.

The action of the government in leasing out the land of the lessee describing the same as Balumohal being within the Chundeecherra Tea Estate leased out by the lease agreement dated March 19, 1988 was not legal and the said action was taken without lawful authority.

Accordingly, the appeal is allowed without any order as to costs.

6.3 Samudra Ejazul Haque and others v. Farhana Azad and another

Present: Mr. Justice Md. Ruhul Amin, Chief Justice, Mr. Justice M.M. Ruhul Amin, Mr. Justice Md. Tafazzul Islam , Mr Justice Md. Hassan Ameen

Civil Petition for leave to appeal no. 346 of 2007, (From the Judgment and Order dated 1.3.2007 passed by the High Court Division in Writ Petition No. 770 of 2007)

MD RUHUL AMIN, CJ

The respondent No.1 in Writ Petition No. 770 of 2007, which was filed questioning custody of two minors, a boy and a girl born on December 11, 2002 and August 30, 2000 respectively, has

filed this petition for leave appeal against the judgment and order dated March 1, 2007 passed in the aforesaid writ petition.

The writ petition was filed by the mother of aforementioned boy and girl, alleging inter alia that the said boy and girl are being detained illegally by the writ respondent Nos. 1-3 i.e. father, grand father and grand mother.

The High Court Division made the Rule obtained in the aforementioned writ petition absolute in the following terms: "two minors, namely, Sagorika Noami Azad Huq and Mehrab Faraj Huq are being held in the custody of the respondent Nos. 1-3 without lawful authority and in an unlawful manner. The respondents are directed to handover the above two minors to the custody of the petitioner by the noon of March 14, 2007". The High Court Division also made the direction about the visiting or seeing the minors by the writ respondents to the effect " the respondents shall have the liberty to see the minors twice in a week at the residence of the petitioner or at a place to be agreed upon between the parties. If any dispute (seeing the minors) arises in this regard it will be taken care of by the Family Court".

The High Court Division also directed the 5th Court of Additional Assistant Judge and Family Court, Dhaka to dispose of the Family Case No. 51 of 2007 within 3 (three) months from the date of receipt of the copy of the judgment.

The writ petition was filed alleging, inter alia, that the writ petitioner was married to the respondent No.1 on January 15, 1993, that she was subjected to torture and oppression and was in continuous physical pressure, that two minors Sagorika Noami Azad Huq (daughter) and Mehrab Faraj Huq (son) were born to the writ petitioner and the writ respondent No.1 on August 30, 2000 and December 11, 2002 respectively, that while writ petitioner's husband, respondent No.1, was in USA from February 4, 2005 she was tortured by the writ respondent Nos. 2 and 3 and that inspite of the torture she for the sake of her two minor children did not take any steps to come out of the marital life, that respondent Nos. 2 and 3 without caring about her children and the welfare of the minors compelled the writ respondent No.1 to divorce the writ petitioner on April 23, 2006, that the respondent No. 3 upon playing a dubious role kept the writ petitioner in the house of the respondent Nos. 2 and 3 for 90 days assuring reconciliation between her and the respondent No.1 but after 90 days the respondent Nos. 2 and 3 called writ petitioner's brothers and made unfounded allegations against the writ petitioner and that upon obtaining signature on blank stamp papers drove the writ petitioner out of her conjugal home i.e. from the house of the writ respondent Nos. 1-3 detaining the minors in the house of the respondent Nos. 2-3. The writ petitioner has also alleged that she was allowed to visit her son and daughter on two occasions during the period of 8 months and that writ petitioner was not allowed to talk to her son and daughter over telephone and that she was also not allowed after the afore mentioned period to see her children. It has further been alleged by the writ petitioner that children were pressurized not to talk their mother. It was contended by the writ petitioner that the children being minors the mother under the law is entitled to have the custody of the minors, that the respondents upon illegally detaining the children deprived them of the care as well as love and affection of the mother, that the children being minors the mother is the appropriate person for the custody of the minors in the background of the question of welfare of the minors. It has been stated by the writ petitioner that the respondent No. 1 returned to Bangladesh with a wife and going to hold weeding reception, that the respondent Nos. 2 and 3 on the basis of the forged under taking denying the

writ petitioner from seeing her children. It has been alleged by the writ petitioner that the respondent No.1 is under contemplation to take the minor children to U.S.A. and the children if so taken to the United States they would be taken to a house which is not their mother's house but step mother's home and in that case the welfare and best interest of the children will be seriously neglected and disregarded.

It has been asserted by the writ petitioner as the children, who are minors, are being detained illegally in the custody of the respondent Nos. 1-3 and as respondent No.1 had married upon divorcing the writ petitioner the mother of the minors, consequently as the children's welfare interest would be seriously prejudiced if they are being detained in the custody of the respondent Nos. 1-3, the writ petition is being compelled to file the writ petition seeking custody of the minors.

The Rule obtained by the writ petitioner was jointly opposed by the respondent Nos. 1-3 denying the averments made in the writ petition except the fact that respondent No.1, in the writ petitioner, and the writ petitioner were married on 15 January, 1993 and that out of their marriage a boy and a girl born on December 11, 2002 and August 30, 2000 respectively. It was the case of the respondents that writ petitioner has not come before the High Court Division with clean hands and that although mother has right to the custody of the children but the writ petitioner being guilty of immoral activities has lost the right of custody of the children, that in deciding question of custody of minors the primarily question would be before the Court welfare and interest of the minors, that custody and guardianship of a minor is being dealt with by the Guardians and Wards Act, 1890 and the Family Courts Ordinance, 1985 and that writ petition having had filed Family Case No. 61 of 2007 in the 5th Court of Additional Assistant Judge and Family Court, Dhaka in the right of the provision of the Family Courts Ordinance, 1985 the writ petition is not legally well conceived one, that the writ petition has been filed raising the question already raised in the Family Case No. 61 of 2007 and as such the writ petition is not maintainable, that the respondent Nos. 1-3 are father, grandfather and grandmother respectively of the minors and as such the custody of the minors with the respondents cannot be said to be illegal or that the minors are detained illegally in the custody of the respondents, that under no circumstance the minor would be taken out of Bangladesh and that the writ petitioner would be allowed to see the minors at agreed time and place without any hindrance till the matter of custody of the minors is decided by the Family Court. It has been alleged by the respondents that respondent No.1 while in USA from February 4, 2005, he on query came to know that the writ petitioner was spending his time with her old and new boy friends in restaurants and parks leaving the children in the custody of others, that respondent No.1 has also " irrefutable evidence that the petitioner established illicit relationship, with a lover whom she was meeting regularly" and that respondent No.1 on his return from USA on further inquiry was satisfied about illicit relationship of the writ petitioner and that in that state of the matter the respondent No.1 divorced the writ petitioner on April 23, 2006 on " the ground of infidelity", that because of the life style of the writ petitioner she is not entitled to the custody of the minors.

It was contended on behalf of the writ petitioner that she is entitled to custody of the minors till the question of custody is otherwise adjudicated by the competent Court and that till that time writ petitioner has absolute right to have the custody of the minors and that because of the settled principle of law the custody of the minors can not be with the respondent Nos. 1-3.

As against that it was contended on the side of the respondents that the writ petition is not maintainable since the question of custody will be taken care by the Family Court in Family Case

No. 61 of 2007 and that in the background of the facts stated by the respondent Nos. 1-3 in their affidavit-in-opposition and the supplementary affidavit the writ petitioner can not claim custody of the minors since she has resorted to a life style which is prejudicial to the welfare and best interest of the minors. It has also been contended from the side of the respondents that till the question of custody of the minors is being adjudicated by a competent Court the minor should be with the respondents and in the custody of the respondent Nos. 1-3, that the writ petitioner so filed is a misconceived one since the minors are not in the custody of the respondents without lawful authority.

The High Court Division in making the Rule absolute observed :- "In deciding the question of custody of the minor children the paramount consideration before the Court is welfare of the minors. The term welfare must be read in the largest possible sense which means that every circumstance must be taken into consideration and the Court must do what under the circumstances a wise parent acing for the true interests of the child would do or ought to do. It is difficult for us in the habeas corpus petition to take evidence without which the question as to what is the interest of the child cannot satisfactory be determined. ..... Till the custody of the minors is decided by a competent Court, mother is legally entitled to retain the custody of her minor children. Before adjudication of the of the custody of the minors by a competent Court if they remain in the custody of anybody other than the mother, that custody will be without lawful authority. The Family Court will take care of all aspects of the case and will come to a definite finding as to who is/are entitled to the custody of the minors taking into consideration the paramount question of welfare of the minors but till then the minors shall remain in the custody of the mother as provided under the law".

It is seen from the judgment of the High Court that in opposing the Rule the respondents primarily contended that the writ petitioner leading an immoral life and as such she should not be allowed the custody of the minor children and her previous conduct shows she cannot look after the welfare of the minors and that having been divorced by the respondent No.1 she would not be able to maintain the Children.

The allegation as to leading of immoral life by the writ petitioner is too wide and that the matter of incapability of the writ petitioner to maintain the children is the matter to be adjudicated by the Family Court while deciding the question of custody of the children. It may be mentioned before the writ Court no substantial material was brought on record to establish the allegation of leading an immoral life by the writ petitioner.

It is interesting to notice that some time the writ respondents were opposing the custody of the minors with their mother alleging that the writ petitioner being divorced would not be able to maintain the minors and at the same time it was stated that the writ petitioner is a teacher at Scholastica School, Dhaka and as such it is not possible on the part of the writ petitioner look after the minors. The High Court Division considered these contentions of the respondents and thereupon has observed "It cannot be said that a working woman divorced by her husband in unworthy of the custody of her minor children".

The learned counsel appearing in support of the petition for leave to appeal has submitted that the High Court Division wrongly made the Rule absolute without taking into consideration that the matter of custody of the minors is awaiting adjudication by the Family Court in Family Suit No. 61 of 2007 filed by the writ petitioner, respondent No.1 herein and in that state of the matter the

High Court Division ought not have exercised its jurisdiction under Article 102(2)(b)(I) of the Constitution and thereupon ought to not have declared custody of the minors with the father and the grand parents as without lawful authority or in an unlawful manner, that in the background of the fact that with regard to the custody of the minors Family Suit No. 61 of 2007 is now pending before the Family Court, Dhaka, the Writ Petition, having been filed on the self same issue being not maintainable and that facts brought on record being highly contentions and disputed which cannot be decided in a proceeding which is adjudicated upon affidavits and in a summary manner the High Court Division was in error in making the Rule absolute on the view that the mother has the legal right to have the custody of the minors but totally left out of consideration the material fact that the mother i.e. the writ petitioner lost right of custody of the minors "being a mother habituated with illicit relationship and guilty of immoral activities", that the High Court Division in making the Rule absolute did not consider the facts brought on record showing that life style of the mother of the minors is pre-judicial to the best welfare and interest of the minors, that the High Court Division was in error in making the Rule absolute while the said Division itself observed "It is difficult for us in the habeas corpus petition to take evidence without which the question as to what is the interest of the child can not satisfactory be determined" and that also without considering the fact that writ petitioner has filed a case, Family Case No. 61 of 2007 in the 5th Court of Additional Assistant Judge, and Family Court, Dhaka under the provision of Guardian and Wards Act, 1890 and the Family Courts Ordinance, 1985 seeking the relief as to the custody of the minors, that the High Court Division was in error in making the Rule absolute in that the writ petition is misconceived one and the same was not maintainable since as regard the relief sought to be obtained from the High Court Division the writ petitioner has filed as suit before the Family Court and the said suit awaits adjudication involving the issue of custody of the minors, that the High Court Division failed to take into consideration that the respondent Nos.1-3 being father and paternal grand parents respectively and the minors are being in their custody relief sought upon invoking the provision of Article 102(2)(b)(I) of the Constitution was not maintainable and that the High Court Division has also lost sight of the fact that custody of the minors with the writ respondent Nos. 1-3 is on the basis of the express consent of the mother in the background of the undertaking given by the mother on July 7, 2006 and as such the writ petitioner was debarred from taking any exception as regard to the custody of the minors with the petitioners herein.

The contentions so made have already been addressed by the High Court Division and in that view of the matter we do not find any merit in the contentions upon making which leave to appeal is sought. It is suffice to say the undisputed fact is that the children whose custody is being sought by the mother are minors and under the law unless the mother disqualifies herself for having the custody of the minors she is entitled to the custody of the minors for the period as provides by law. The minors in question have not reached that age or that are not of the age disentitling the mother to have the custody of the minors in question. It is seen that the petitioner No.1 (respondent No.1 in the writ petition) has already married for the 2nd time upon divorcing the writ petitioner. In the state of the matter the minors, if allowed to be in the custody of the writ respondent No. 1 would certainly be in the house of their step mother, which fact as we find from the judgment of the High Court Division was rightly considered, will not be congenial to the best welfare and interest of the minor. In the background of the facts on consideration whereof High Court Division made order as to custody of the minors with their mother cannot be considered

unsustainable in law. Contention as to the maintainability of the writ petition has also been considered by the High Court Division upon referring the case of Abdul Jalil and others Vs. Mrs. Sharon Laily Begum Jalil reported in (1998) 18 BLD (AD) 21 where in the background of the facts similar to the facts of the case before us and in the background of facts alleging which writ petition was filed under Article 102(2)(b)(I) of the Constitution seeking custody of the children by the mother, the question of maintainability of the writ petition having been raised it has been observed "aggrieved mother has the right to move the High Court Division under Article 102(2) of the Constitution for immediate custody of the children which may be ordered in the interest and for the welfare of the said children". We have already observed that the allegation of leading immoral life by the mother made from the side of the writ respondents were not substantiated by tangible material and moreover the said allegation would be adjudicated by the Family Court on consideration of the evidence, if any, brought before the said Court and in that state of the matter we are of the view the High Court Division was correct in not considering the contention of the petitioners herein as to leading of immoral life by the respondent No.1 herein and thereupon in not disentitling her from the custody of the minors.

The High Court Division while making the Rule absolute has also made the provision for visiting the minors by the father as well as the grand parents while the minors are in the custody of the mother and that in case of difference as to the time and place of visiting the minors the final decision has been left with the Family Court before whom Family Case No. 61 of 2007 is pending.

In the background of the discussion made above and in the stated matter we do not find any reason to interfere with the judgment of the High Court Division.

Accordingly, the petition is dismissed.

6.4 Md. Abu Safa v. Abdul Momen Chowdhury and others

Present:

Mr. Justice Md. Ruhul Amin, Chief Justice
Mr. Justice Mohammad Fazlul Karim
Mr. Justice M. M. Ruhul Amin,
Mr. Justice Md. Tafazzul Islam,
Mr. Justice Md. Joynul Abedin,
Mr. Justice Md. Hassan Ameen,

CIVIL APPEAL NO. 57 OF 2006

(From the Judgment and order dated 24th May, 2005 passed by the High Court Division in writ Petition o. 2561 of 2005)

Md. Abu Safa Versus Abdul Momen Chowdhury and others

Date of hearing The 11th December, 2007

ORDER

On 28th November, 2007 Mr. Md Nawab Ali, Advocate-on-record for the appellant was directed to ensure appearance of the appellant Mr. Md. Abu Safa, who was not a party in the writ petition, but with the leave of the Court has filed the appeal since he alleged that he was aggrieved by the Judgment and order of the High Court Division dated 24-5-2005 passed in writ Petition No. 2561 of 2005.

From the Respondents' (Respondent Nos. 1 3) side identity of the appellant was seriously disputed stating that the appellant is a fictitious person and somebody else by fabricating papers has filed the appeal i.e. Civil Appeal No.57 of 2006 against the judgment and order dated 24.5.2005 of the High Court Division passed in the writ Petition No. 2561 of 2005.

In that background Mr. Md. Nawab Ali, Advocate-on-record was directed to ensure appearance of Mr. Md. Abu Safa, the appellant before the Court today. In compliance of the Court's Order dated November 28, 2007. Mr. Nawab Ali, learned Advocate-on-record to-day i.e. 11.12.2007 has filed an affidavit, purported to be compliance of the Court's order dated November 28, 2007 We have gone through the statements made in the affidavit so filed by Mr. Md. Nawab Ali, the learned Advocate-on-record and other martial's attached thereto. The statements made in the affidavit and the papers attached thereto have no relevance to the context of this court's order dated 28.11.2007 In view of the nature and kind of statements made in the affidavit and papers attached to the affidavit it can reasonably be considered that same has been done only to avoid compliance of the Court's order directing the learned Advocate-on-record to ensure appearance of the appellant in the court. The learned Advocte-on-record made submissions in the context of the affidavit he filed in the light of the direction of the court made by the order dated 28.11.2005. The learned Advocte-on-record submitted that the appellant being apprehensive of odd situation is avoiding appearance before the court. We asked the learned Advocate-on-record to furnish particulars of the place where his client staying but he avoided. Because of kind and nature of the affidavit filed by the learned Advocate-on-record the same is no way be considered compliance of the order of this court to ensure the appearance of the Appellant Mr. Md. Abu Safa in the Court.

Upon hearing the learned Advocate-on-record Mr. Md. Nawab Ali and on perusal of the Affidavit filed by him as the pretext of compliance of the Court's order dated 28.11.2007, it is difficult to consider and to accept, as the learned Advocate submitted, that the appeal in question has been filed by a person by name Md. Abu Safa.

In the background of the aforestated matter we are of the view that the appeal being Civil Appeal No 57 of 2006 was filed by non-genuine person upon using imaginary name of a person and that upon using fabricated papers. Such manner of filing a case is highly depreciable one and as such strongly dis-approved by the Court. The Advocate-on-record is cautioned as well as warned from repeating such kind of thing in the future

Since the appeal has been field by fabricating papers which highly condemnable in law and consequently there being no appeal in the eye of law we are not entering into the merit of the appeal.

The appeal is dismissed since the appeal was filed by using fabricated and non-genuine papers and for non-compliance of the court's order dated November 28, 2007.

power is assumed in an extra-constitutional manner by any authority not mentioned in the Constitution, then it must amount to usurpation in all events. It would obviously be a question for determination in the circumstances of the particular case before the Court as to whether the assumption of power amounts to usurpation or not.

It is also clear from the various judgments delivered in Asma Jilani's case that the question of condonation arose only on the view that the Army Commander-in-Chief was a usurper. The learned Attorney-General is, therefore, right in saying that in a case where extra-constitutional intervention is justified by necessity then different considerations arise from those which would be relevant for judging the acts of a usurper."

In my life, I have always felt inspired by the excellent manner of writing of those and other great Judges. Also cannot forget the artistry and excellence of a great man of the Bar Sher-e-Bangla A.K. Fazlu Huq, who seems to have set himself very late in life to write his autobiography but could leave only a Foreword for his book to be which reads-

"In my stormy and chequered life, chance has played more than her fair part. The fault has been my own. Never at any time have tried to be the complete master of my own fate. The strongest impulse of the moment has governed all my actions. When chance has raised me to dazzling heights, I have received her gifts with outstretched hands. When she has cast me down from my high pinnacle, I have accepted her buffet without complaint. I have my hours of penance and regret. I am introspective enough to take an interest in the examination of my own conscience. But this self analysis has always been detached. It has never been morbid. It has neither aided nor impeded the fluctuation of my varied career.

It has availed me nothing in the eternal struggle which man wages on behalf of himself against himself. Disappointments have not cured me of an ineradicable romanticism. If at times I am sorry for something I have done, remorse assails me only for the things I have left undone."

Are you looking for eloquence else where?

Mr. Justice A.T.M. Afzal

Born on 01.06.1934

Elevated as Additional Judge of the High Court Division on 15.04.1977 and appointed Judge of the same division on 14.04.1979. Elevated as Judge of the Appellate Division on 26.12.1985 and assumed the Office of the Chief Justice on 01.05.1995. Retired on 01.06.1999.

Leading Decisions of the Supreme Court of Bangladesh in the Year 2008

In view of Article 111 of the Constitution of Peoples Republic of Bangladesh, the law declared by the Appellate Division of the Supreme Court of Bangladesh is binding on all courts within the territory of Bangladesh including High Court Division of the Supreme Court of Bangladesh. Every judgement delivered by the Appellate Division of the Supreme Court of Bangladesh has its own significance. Brief note of some judgements, which have wider implications and impact on various sections of the society, delivered during the preceding year are given below:

1. In **The State Vs. Moyez Uddin Sikder and others [(2008) 13 MLR (AD) 208, 28 BLD(AD) 135]**, the Appellate Division of the Supreme Court of Bangladesh held that regardless of the ouster of the jurisdiction there may be cases depending on the facts of each case making out a case of without jurisdiction, coram non-judice or mala fide and finding of the Court to that effect upon final adjudication and determination and then in those cases the bar in Rule 19(Gha) in granting bail under section 498 of the Code of Criminal Procedure will not apply. The said bar will not apply in cases of persons arrested on suspicion under Rule 6(2) of the Emergency Rules, 2007 who are not yet accused within the meaning of Rule 19(Gha) of the Emergency Power Rules. There may be cases provided for under the proviso to Rule 19(Gha) where also the said bar will not apply.

2. In **Government of of Bangladesh and others Vs. Iqbal Hasan Mahmood alias Iqbal Hasan Mahmood Tuku, [(2008) 60 DLR (AD) 147]** the Appellate Division of the Supreme Court of Bangladesh held that the contention raised by the learned Attorney-General that the writ petition filed by the respondent challenging the proceeding in the aforesaid special case now pending against him before the Special Judge is not maintainable for not having exhausted the otherwise efficacious alternative remedy by way of a petition under section 561A of the Code of Criminal Procedure is also not acceptable inasmuch as the instant writ petition has raised question of law and interpretation of statute. Further, the respondent had no other efficacious alternative remedy under the Income Tax Ordinance to challenge the criminal case now pending against him. It is pertinent to point out that a Division Bench of the High Court Division has already held in the case of Jahangir Hossain Howlader 58 DLR 106 that filing of an application under section 561A of the Code of Criminal Procedure is not an adequate alternative remedy as contemplated under Article 102(2) of the Constitution. Further, in the case of MA Hai Vs TCB 40 DLR(AD) 206 it is held that availability of alternative remedy by way of appeal or revision will not stand on the way when the question of law and interpretation of statute is involved. It is also decided in the case of Nesar Ahmed Vs Government of Bangladesh 49 DLR (AD) 111 that when it becomes impossible to avail of the alternative remedy relief by way of writ petition under Article 102 of the Constitution is competent. The instant writ petition is therefore maintainable.

3. In **Government of Bangladesh and another Vs. Sheikh Hasina and another [(2008) 60 DLR (AD) 90]** the Appellate Division of the Supreme Court of Bangladesh held that a person accused of the commission of an offence has no fundamental rights to a trial by a particular Court or by a particular procedure except insofar as any Constitutional objection by way of discrimination or violation of any other fundamental right may be involved. In other words, the prohibition under this clause does not extend to merely procedural laws and procedural law would not contravene Article 35(1) merely because retrospective effect is given to it.

4 In **Alhaj Hasen Ali Mondal and others Vs. Deputy Commissioner, Chapainawabgonj and others. [(2008) XI BSCD]** the Appellate Division of the Supreme Court of Bangladesh held that as it appears the High Court Division disposed of the Rule with the observations that the proceedings of m.c.A. Case No. 04 of 2003 2004 shows that the petitioners filed objection therein against the notices submitting that the amount of compensation as given in the award are not adequate and no objection was raised therein as to specifications and identification of the lands sought to be acquired and that the question of adequate compensation as well as the fact of wrong recording of the name of Hitendranath in the award, instead of the name of the petitioners, can be resolved by the authority concerned. Accordingly we find no illegality or infirmity in the decision of the High Court Division so as to call for any interference

5 In **Government of Bangladesh and another Vs. Sheikh Hasina and another.] (2008) 28 BLD (AD) 163]** the Appellate Division of the Supreme Court of Bangladesh held sanction given by Government under rule 9 (1) (2) of Emergency Power Rules, 2007 is valid in the eye of law. There is nothing in Emergency Power Ordinance or Rules, 2007 which contravene the provisions of Article 35(1 of the Constitution. Article 35(has no application in matters of civil liability

6 In **Anti-Corruption commission Vs. Syed Tanveer Ahmed and another [(2008) V ADC 383]** the Appellate Division of the Supreme Court of Bangladesh held that the grounds upon which the bail was granted do not inspire our confidence in view of the above provision of section 9(Ga) of the Emergency Power Rules 2007. Accordingly we are not inclined to enlarge the accused on bail. Accordingly, it is ordered that the order passed by the High Court Division on 8.11.2008 in writ Petition No. 9581 of 2007 is hereby vacated and the accused must be taken to custody if they have already been enlarged on bail. The parties, if so advised, may take step for disposal of the aforesaid writ petition expeditiously

7 In **Abdur Rahim and others Vs. The Government of Bangladesh and others [(2008) XI BSCD]** the Appellate Division of the Supreme Court of Bangladesh held that it is to be noted here that a mere recommendation for granting lease in favour of the petitioners did not create any right in their favour. The alleged recommendation made in 1997 has become meaningless with the efflux of time and now it has lost its efficacy. The identity of the land in question has been seriously disputed by the parties. The respondent no. 6 as well claimed that the land in question is beyond the land of B.S plot No. 2002 alleged to have taken lease by the petitioners. The identity of the plot land and other incidental matters are surely disputed question of facts and could not be subject matter of the writ jurisdiction

8 In **Abdul Jabbar (Md) Vs. Government of of Bangladesh, and others. [(2008) 13 BLC (AD) 51]** the Appellate Division of the Supreme Court of Bangladesh held that the High Court Division held that no proceeding was started against the respondent No. 8 and no inquiry was initiated before placing him under suspension and, as such, the order of suspension is ex-facie illegal and the said order has been made in violation of the Rules. Therefore, in the facts and circumstances of the case and in view of the discussion made above, we are of the view that the High Court Division upon correct assessment of the materials on record arrived at a correct decision.

9 In **Ashraf and others Vs. Md. Zahangir Alam & others [(2008) 60 DLR (AD) 66]** the Appellate Division of the Supreme Court of Bangladesh held that before we part with the matter we would like to record our utmost disapproval and dissatisfaction at the conduct of the learned Judges of the Writ Court in negotiating the price of the remaining 9 items by substituting the decision of writ-respondent-Government for the same and thereafter directing the said respondent Government to allow the writ petitioner to take delivery of the remaining 9 items by accepting such negotiated price, inasmuch as negotiation of sale price, with the parties never falls within the domain of the Court.

10 In **Government of Bangladesh Vs. Mosammat Rezia Begum [(2008) XI BSCD]** the Appellate Division of the Supreme Court of Bangladesh held that the learned Deputy Attorney General, appearing for the petitioners, submits that the judgment and order of the High Court Division is bad in law, inasmuch, the same has been passed without considering the actual facts and circumstances of the case in the matter of pursuing the Government policy. He further submits that the High Court Division failed to consider that the petitioners are serving on master-rolls and they have no legal right to be appointed earlier in 1995 or even today or thereafter as such the writ-petitions are being misconceived the rule ought to have been discharged. Accordingly, she submits that the impugned order is liable to be set aside

11 In **Khandker Zillul Bari and ors Vs. The State[(2008) 28 BLD (AD) 145]** the Appellate Division of the Supreme Court of Bangladesh held that this Court though sitting on appeal over the judgment and order of acquitta passed by the High Court Division has been given a special power to do complete justice under Article 104 of the Constitution inasmuch as this Court has been armed with the power of reviewing its own judgment under Article 105 of the Constitution and the provision of Article 105 should not usually be discussed in isolation which may be read with the provision of Article 104 of the Constitution in achieving complete justice

12 In **Dawad Ali Sardar (Md) Vs. Kazi Mujibar Rahman[(2008)13 BLC (AD) 67]** the Appellate Division of the Supreme Court of Bangladesh held that the observation of the High Court Division that the trial Court that is, the learned additional District Magistrate had no jurisdiction to frame charge under section 307 of the penal Code is not correct but since the High Court Division found on detailed discussion of the evidence of the prosecution witnesses that there is not a single independent and disinterested witness to support the prosecution case, the Appellate Division is not inclined to review the impugned judgment only on the ground that the High Court Division wrongly observed that the learned Additional District Magistrate had no jurisdiction to frame charge under section 307 of the penal Code because that would be a futile exercise in the instant case. Accordingly the review petition is dismissed.

13 In **Ameena Ahmed Vs. Government of the People's Republic of Bangladesh and ors. [(2008)V ADC 397]** the Appellate Division of the Supreme Court of Bangladesh held that the High Court Division rightly held that in respect of 8.5 acres of land acquisition processing could not proceed due to issuance of stay order by the High Court division but the proceedings of L.A. case, however, continued in respect of remaining lands and gazette notification under Sections 7 and 9 of the Acquisition and Requisition of Immovable Property Ordinance, 1982 were duly published. It further appears that there is no decision by the Government to exclude any land covered by notice under section 3 thereof from acquisition. The learned Attorney General submits that during the joint survey no existence of mosque was found and after obtaining the stay the petitioner, even if, created any structure

or obstruction these are all unauthorized acts of the petitioner to frustrate the acquisition. The acquired land can only be excluded by the Government and the Court has nothing to do in the matter. In the facts and circumstances of the case we find no merit in this petition which is accordingly dismissed.

14. In **Md. Shafiqul Islam Chowdhury & ors Vs. Mustafizur Rahman and others [(2008) 28 BLD (AD) 39]** the Appellate Division of the Supreme Court of Bangladesh held that amendment of a plaint can be allowed under the discretionary power of the Court and such discretion is required to be exercised judicially and not in an arbitrary or perfunctionary manner amounting to an illegal exercise of jurisdiction. An amendment to the plaint must not be allowed if it tends to change the nature and character of the suit.

15. In **Bangladesh Vs. A.H.M. Khurshed Ali & others [(2008) 28 BLD (AD) 159, 13 BLC (AD) 114]** the Appellate Division of the Supreme Court of Bangladesh held that District Judge has no jurisdiction to hear the revisional application against the order of the Joint District Judge in a suit the valuation of which is above Tk. 5,00,000/- and in such matters the revisional application shall lie before the High Court Division under section 115(1) of the Code of Civil Procedure.

16. In **The State Vs. Sailendra Chandra Barman [(2008) 16 BLT (AD) 265 = 13 BLC (AD) 65]** the Appellate Division of the Supreme Court of Bangladesh held that the alleged forged document was not filed before the civil Court for only a certified copy thereof was filed. Hence the bar of prosecution as provided under section 195(1)(c) of the Code of Criminal Procedure is not attracted in the present case.

17. In **The State Vs. Omar Ahmed [(2008) 28 BLD (AD) 23]** the Appellate Division of the Supreme Court of Bangladesh held that mere convenience of parties or witnesses or expediency is not the only criteria for transfer of the case from one district to another district.

18. In **Nizamuddin Mahmood Vs. Abdul Hamid Bhuiyan and another [(2008) XI BSCD]** the Appellate Division of the Supreme Court of Bangladesh held that it is not possible to know about the date of receipt of the notice for the complainant and such a fact is to be proved at the trial and generally in all cases the receipt of notice is denied and service is asserted and therefore, such a question cannot be decided in a proceeding under section 561A of the Code of Criminal Procedure. In view of the decision of this Court in the case of Abdul Quader Chowdhury Vs. The State reported in 28 DLR (AD) 38 where it was held that where assessment of evidence is involved the case cannot be quashed.

9. In **Anti-Corruption Commission Represented by its Chairman Vs. Barrister Mir Mohammad Helal Uddin and Another [(2008) 28 BLD (AD) 72, V ADC 344]**, the Appellate Division of the Supreme Court of Bangladesh held that we cannot but hold that Rule 11 of the Emergency Powers Rules, 2007 as a whole is not only applicable in respect of offences mentioned in Rules 3 to 8 of the Rules but also in respect of the offences under the laws mentioned in Rules 14 and 15 of the Rules inasmuch as the Rules are to be read and construed as a whole and not in isolation of each other. Granting of bail by the appellate Court is governed by section 426 of the Code of Criminal Procedure. In view of Rule 2 of the Rules section 426 of the Code of Criminal Procedure could have been applicable had it not been inconsistent with Rule 11(3) of the Rules and since Rule 11(3) specifically bars the jurisdiction of the appellate court which is in the instant cases the High Court Division, no bail can be granted by the appellate court as the High Court Division in view of Rule 11(3) of the Rules.

Official Publications

Publications of the Supreme Court of Bangladesh

AT A GLANCE

1. The Bangladesh Supreme Court Digest:
   - Volume - I (1972 - 1977)
   - Volume - II (1978 - 1979)
   - Volume - III (1980 - 198
   - Volume - IV (1982 - 1983
   - Volume - V (1984 - 1985)
   - Volume - VI (1986 - 1987)
   - Volume - VII (1988 - 1989)
   - Volume - VII (990 - 99
   - Volume - IX (1992 - 2006)
   - Volume - X (2007)
   - Volume - XI (2008
2. The Code of Criminal Procedure, 1898 (Revised and printed with Amendment up to October 2007)
3. The Supreme Court of Bangladesh (Appellate Division) Rules, 1988 (Revised and printed with amendment up to 22/04/08)
4. Annual Report of the Supreme Court of Bangladesh, 2008

The publications are available at the Libraries of Supreme Court and distributed to the Government Departments, Subordinate Courts, Bar Libraries and Government Libraries, but not for sale.

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Leading Decisions of the Supreme Court of Bangladesh in the year 2009

In view of Article 111 of the Constitution of the People's Republic of Bangladesh, the law declared by the Appellate Division of the Supreme Court of Bangladesh is binding on all courts within the territory of Bangladesh including High Court Division of the Supreme Court of Bangladesh. Every judgment delivered by the Appellate Division of the Supreme Court of Bangladesh has its own significance. Brief note of some judgments, which have wider implications and impact on various sections of the society, delivered during the year 2009, are given below:

1. In **General Manager, Postal Insurance Eastern Region, Dhaka and another Vs. A.B.M. Abu Taher [(2009) 29 BLD (AD) 56]** the Appellate Division of the Supreme Court held that review is not meant for rehearing the matter already finally decided by pronouncement of judgment. Except in exceptional circumstances on ground of error apparent on the face of the record or discovery of new and material evidence and error in interpretation of law, review of judgment cannot be entertained.

2. In **Anti-Corruption Commission and others Vs. Mahmud Hossain and others [(2009) 61 DLR (AD) 17]** the Appellate Division of the Supreme Court held that the cardinal principle of criminal jurisprudence is that the person concerned should submit to the process of justice before he can claim the right of audience provided in law. The age-old maxim is that a man who seeks justice from a Court of Law must come before the Court to agitate his grievance by first surrendering to the process of justice, otherwise he remains a fugitive from justice and cannot seek the aid and assistance of the process of justice and claim right of audience against the process of the Court issued against him.

3. In **Chairman, Rajdhani Unnayan Kartripakkha (RAJUK) Vs. A Rouf Chowdhury and others [(2009) 61 DLR (AD) 28]** the Appellate Division of the Supreme Court held that the writ-petitioners could not show any reliance upon legal authority since the alleged permission by RAJUK was subject to restrictions imposed by Rule 26 of the Building Construction Rules and mandatory provision of obtaining the permission under the provision of Civil Aviation Rules, 1984 and the absence of such permission rendered the plan of a high-rise building illegal and, as such, no reliance could be placed by the writ-petitioners as to the alleged legitimate expectation and promissory estoppel.

4. In **State Vs. Jahedul Islam @ Moulavi Babu [(2009) 14 BLC(AD) 105]** the Appellate Division of the Supreme Court held that the confession of the accused respondent is to be considered true and voluntary even though as in the instant case he was produced before the Magistrate in Naogaon on 24-5-1988 for recording his confession after he was arrested by the police in Dhaka on 16-5-1988. No information is available on record as to how long the accused respondent was in police custody before he was produced before the Magistrate for recording his confession. Prosecution however, claimed that the accused respondent was not in police custody after his arrest in Dhaka till his production before the Magistrate at Naogaon for recording his confession. The time consumed between his arrest in Dhaka and his production before the Magistrate at Naogaon for recording confession on completion of legal formalities should not be taken to be the period of his detention in police custody. The time so spent should be considered as the time consumed for his transportation from Dhaka to Naogaon. Further, the Magistrate PW 7 as well as the Investigating Officer PW 9 were not cross-examined by the defence as to any police torture on the accused respondent while in police custody.

5. In **Ataur Rahman (Md) and others Vs. BM Muhibur Rahman and others [(2009) 14 BLC (AD) 62]** the Appellate Division of the Supreme Court held that the High Court Division heard and disposed of the Rule making the same absolute by the impugned judgment dated 10-2-2007 on the ground that the impugned Gm, Avi, I bs 250Đ AvBb/ 2006 mg(wewaD5)D15/2002 dated 11-10-2006 was illegal and unconstitutional being hit by Articles 27, 29 and 31 of the Constitution being arbitrary and discriminatory.

In it an admitted position that the writ respondent Nos. 4-17 could not take departmental examination as well as the foundation training as required of them by the Recruitment Rules, 1981 within the period of their probation for no fault of their own but for the reason that the Government could not make any arrangement for holding such examination and training within their probation period until SRO 7 of 1992 was promulgated. On the other hand, the writ petitioners having joined the service in 1998 had the scope and opportunity to avail of both the departmental examination and foundation training, inasmuch as the SRO 7 of 1992 set out the course (subjects) for departmental examination and foundation training as well as the procedures for such examination and training. In other words, all the arrangements and facilities were in place for holding departmental examination and foundation training with effect from 12-1-1992 and the writ petitioners availed of the same. The writ respondent Nos. 4-17 even having joined the general education service before the writ petitioners could not take the said examination and the foundation training and were being unduly prejudiced and discriminated in the matter of their confirmation in service and promotion to the senior scale. In order to remove this injustice and inequality between these two groups of members of the same service, Bangladesh Civil Service (General Education) Cadre, the President promulgated the impugned SRO dated 11-10-2006 exempting the members of the service, who could not take the departmental examination and foundation training for no fault of their own, from taking departmental examination and foundation training.

Since the impugned SRO amending the Recruitment Rules, 1981 was promulgated to fulfill the aforesaid governmental objective to remove undue hardship and injustice confronting the writ respondent Nos. 4-17 the same cannot be said to be discriminatory legislation and for the same reason such legislation cannot be also said to be a class legislation.

In the instant case the impugned notification was found necessary in view of the circumstances in which the writ respondent Nos. 4-17 were being deprived of being confirmed in service and promotion to the senior scale and this classification got reasonable basis having nexus to the object to be achieved, that is, to do justice to the writ respondent Nos. 4-17 and their other colleagues who having been appointed in the service prior to 12 January 1992 could not appear in the departmental examination and complete their foundation training for no fault of their own.

6 In **Md. Ataur Rahman & others Vs. Bangladesh [(2009) 14 MLR (AD) 138]** the Appellate Division of the Supreme Court held that article 141B and 141C provides for the effect of the Proclamation of Emergency. For our present consideration provisions under Article 141C(1) is material which reads as under:

> "141C. (1) While a Proclamation of Emergency is in operation, the President may, [on the written advice of the Prime Minister, by order], declare that the right to move any court for the enforcement of such of the rights conferred by Part III of this Constitution as may be specified in the order, and all proceedings pending in any court for the enforcement of the right so specified, shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order."

The President in terms of Article 141C(1) is empowered to suspend the enforcement of any of the fundamental rights conferred by Part III during the period when a Proclamation of Emergency is in operation. It is for the President to decide the enforcement of which of the fundamental rights should be suspended during the operation of the Proclamation of Emergency and this po9wer is not liable to be circumscribed or limited by any other provisions in the Constitution including Article 26. Once a Proclamation of Emergency has been made the security of Bangladesh or any Part thereof invest in the President all out power to suspend the enforcement of any of the fundamental rights conferred by Part III of the Constitution. This is necessary to keep up and maintaining the welfare of the State. As a matter of fact there is no scope for enquiry into the question whether the fundamental rights the enforcement of which the President has suspended under Article 141C(1) has anything to do with the security of Bangladesh which is threatened whether by war or external aggression or internal disturbance. If the President considered the suspension of the fundamental rights to be necessary during the subsistence of the Proclamation of Emergency it should be taken to have been made in the interest of security of Bangladesh and no further proof of the security is necessary.

7. In **Government of Bangladesh & others Vs. Abdus Sukur Prodhan and others [(2009) 14 MLR (AD) 169]** the Appellate Division of the Supreme Court held that the power to confiscate was added by Ordinance No. 6 of 1978 by Section 8 thereof but fact remains that it came into being long before the date of the offence either on 26.08.1989 or on 13.09.1989 and therefore the question of imposing the penalty grater than or different from that which could be inflicted under the law at the time of the commission of offence does not arise. Both Section 5 (2) of the prevention of Corruption Act, 1947 and Section 109 of the Penal Code under which the appellants were convicted were very much existing laws and the power to confiscate was already there long before the date of the commission of the offence as early as in 1978 and therefore the Special Judge was fully authorised to confiscate the lands in question in respect of which the offence under the above sections was committed by the appellants.

8. In **M.A. Sattar and others Vs. the State [(2009) 14 MLR (AD) 169=14 BLC (AD) 74=29 BLD (AD) 36]** the Appellate Division of the Supreme Court held that both Section 5(2) of the Prevention of Corruption Act, 1947 and Section 109 of the Penal Code under which the appellants were convicted were very much existing laws and the power to confiscate was already there long before the date of the commission of the offence as early as in 1978 and therefore the Special Judge was fully authorized to confiscate the lands in question in respect of which the offence under the above sections was committed by the appellants

9. In **Cap. (Rtd.) B. Akram Ahmed Khan Chowdhury Vs. Bangladesh Oil, Gas and Mineral Resources Corporation [(2009) 14 MLR (AD) 81** the Appellate Division of the Supreme Court held that as per provision of Public Servants (Retirement) Act, 1974 (Act 12 of 1974) the Government is the only authority to make such order of premature retirement on completion of 25 years of service under section 9(2) of Act 12 of 1974 and the respondent No. 2 in exercise, of purported power under section 5 (kha) of the Pension and General Provident Fund rules, 1987 had no authority and power to retire him prematurely from the service. Incorporation of section 5 (kha) in Pension and General Provident Fund rules, 1987 of the respondent No. 2 was redundant as it has no relevancy with the subject matter of the rules so framed. The High Court Division having not considered the materials on record in their proper perspective and accordingly arrived at an erroneous decision which was set aside by the Appellate Division.

10. In **Shahid Hamid Vs. Nilufar Momtaz [(2009) 14 MLR (AD) 33** the Appellate Division of the Supreme Court held that when the marriage is admittedly dissolved by talak at the instance of the husband, the wife is legally entitled to realize the dower money as stipulated in the kabinnama and also maintenance during the period of her iddat. The husband having failed to prove the payment .

of dower by any cogent evidence the Family Court decreed the suit which was upheld by the High Court Division and there after by the Appellate Division.

11. In **Major (Rtd.) Quazi Hasan Hena Begum Vs. Lt. Col. Kazi Mansurul Islam and others [(2009) 6 ADC (AD) 29** the Appellate Division of the Supreme Court held that in the said case, the facts proved has given rise to waiver and acquiescence for which the writ petitioner is estopped from challenging or alleged enforcement of his previous allotment in the single name. The conduct of the writ petitioner, how ever, clearly manifests that a Court of law can reasonably and validly make a inference of waiver and acquiescence. Even act of the writ petitioner-respondent and his participation in subsequent transaction do not, however, show any of his unwillingness or lack of consent at any time of the transaction. The writ respondent as well participated in the transaction by contributing sufficient fund at her disposal even at the stage of construction of the building as has been detailed in her affidavit-in-opposition.

12. In **Majeda Khatun and others Vs. Jiban Nessa and others [(2009) Unreported, Civil Appeal No. 136 of 2003]** the Appellate Division of the Supreme Court held that suit can be remanded by the appellate court with direction for giving findings and decision on certain issues where the trial court omitted to do so. In terms of section 107 of the Code of Civil Procedure the appellate court has the power of remand of a case under the circumstances mentioned in order 41, rules 23 and 25. The appellate court can also exercise the power of remand in remand in exercise of its inherent power. The power of remand by the appellate court is not limited to specific case mentioned in rule 23. The court may also order a remand in case other than those covered under rule 23 and may do so also under section 151 of the Code if it becomes necessary for the ends of justice. Even the High Court Division can make an order of remand while exercising revisional jurisdiction if it is so required for full and effective adjudication of all the relevant points involved in a case No remand order can however be made to facilitate a party to fill up the lacuna in his case.

    It is now well settled that the remand orders are not to be made as a matter of course. The High Court Division as a revisional court is required to properly appreciate the relevance of the evidence on record before making such order of remand. The case of probodh Ranjan Shome Vs. Md. Easin, 4 BSCR (Ad) 457 may be referred to in this connection. Since there is no necessity for taking any further evidence in the interest of resolution of the dispute on title, the order of remand passed by the High Court Division can not be sustained. The case of Sukumar Sen Vs. Gouranga Dey, 42 DLR (AD) 18 can be profitably cited on the point.

13. In **Most. Monowara Begum and others Vs. Malanch Bibi and others [(2009) Unreported, Civil Appeal No. 91 of 2003]** the Appellate Division of the Supreme Court held that the exercise of revisional jurisdiction is confined to question of jurisdiction. While in a first appeal the Court is free to decide all questions of law and fact which arise in the suit; in exercise of its revisional jurisdiction the High Court Division is not entitled to reexamine or assess the evidence on record and substitute its own findings on facts those of the subordinate Courts. Jurisdiction means "the entitlement to enter upon the enquiry in question." The word is a verbal cast of many colours The jurisdiction of the High Court Division in revision is a limited one. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. Section 115 empowers to satisfy the High Court Division on matters that (a) the order of the Subordinate Court is within its jurisdiction (b) the case is one in which the Court ought to exercise jurisdiction, and (c) in exercise of jurisdiction the Court has not acted illegally, that is, in breach of some provisions of law, or with material irregularity by committing some error of procedure in Course of the trial which is material in that is, in breach of some provisions of law, or with material irregularity by committing some error of procedure in course of the trial which is material in that it may have affected the ultimate decision.

Leading Decisions of the Supreme Court of Bangladesh in the year 2010

In view of Article 111 of the Constitution of People's Republic of Bangladesh, the law declared by the Appellate Division of the Supreme Court of Bangladesh is binding on all courts within the terr tory of Bangladesh including H.gh Court Division of the Supreme Court of Bangladesh. Every judgment delivered by the Appellate Division of the Supreme Court of Bangladesh has its own significance. Brief note of some judgments, which have wider implications and impact on various sections of the society, delivered during the year 2010, are given below:

1. In **Khondker Delwar Hossain Vs. Bangladesh Italian Marble Works Ltd. [(2010) 18 BLT (AD) 329],** the Appellate Division of the Supreme Court held that Parliament though may amend the Constitution under article 142 but cannot make the Constitution subservient to any other Proclamation etc. or disgrace it in any manner since the Constitution is the embodiment and solemn expression of the will of the people of Bangladesh, attained through the supreme sacrifice of nearly three million martyrs. Further Parliament, by amendment of the Constitution can not legitimize any illegitimate activity.

2. In **Major (Rtd.) Quazi Hasna Hena Begum Vs. Lt. Col. Kazi Mansurul Islam and others [(2010) 62 DLR (AD) 260],** the Appellate Division of the Supreme Court held that the words 'waiver' and 'acquiescence' and abandonment of a right was aptly considered in Halsbury's Laws of England, 3rd Edition, Volume 14, page 637 wherein it is stated that "wavier, is the abandonment of a right, and is either expressed or implied from the conduct of a person who is entitled to the benefit of a stipulation in a contract or a statutory provision which he may waive and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent and the fact that the other party has acted upon it is sufficient consideration. Where the waiver is not expressed, it may be implied from conduct, which is inconsistent with the continuance of the right. In general, where one party has, by his words or conduct, made to the other a prom se or assurance which was intended to affect the legal relations between them and to be acted upon accordingly, then once the other party acted upo at his word and acted upon to his detriment it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but they must accept their legal relations subject to the qualification which he himself has to introduced, even though is not supported in point of law by any consideration. It has been further stated that "acquiescence" implies that a person abstains from interfering while a violation of his legal rights is in progress and further that acquiescence operates by way of estoppel. It is acquiescence in such circumstances that assent may reasonably be inferred, and is an instance of estoppel by words or conduct Consequently, if the whole circumstances are proper for raising estoppel, the party in acqu escence cannot afterwards complain of the violation of his right.

3. In **Sufia Khatoon Vs. Mahbuba Rahman and others [(2010) 62 DLR (AD) 266],** the Appellate Division of the Supreme Court held that it is pertinent to mention here that according to Salmond a precedent is a judicial decision, which contains in itself a principle. The underlying principle, which thus forms its authoritative element, is often termed the ratio decidendi. The concrete decision is binding between the part es to it but it is the abstract ratio decidendi, which alone has the force of law as regards the world at large.

4. In **Khondker Delwar Hossain, Secretary, BNP and another. Vs. Bangladesh Italian Marble Works and others [(2010) 62 DLR (AD) 298],** the Appellate Division of the Supreme Court held that Doctrine of State Necessity is no magic wand. It does not make an illegal act a legal one, but the

Court in exceptional circumstances, in order to avert the resultant evil of illegal legislations, may condone such illegality for the greater interest of the community in general but on condition that those acts could have been legally done at least by the proper authority.

5. In **Reazaul Karim (Md) and others Vs. ABM Khalequzzaman and others [(2010) 62 DLR (AD) 411],** the Appellate Division of the Supreme Court held that the Company Bench cannot interfere in the internal management of a limited company. Since these directions are ancillary and consequential in nature the High Court Division committed no illegality in exercising the power under section 85(3) of the Act.

6. In **Anti Corruption Commissioner and others Vs. Md. Obaidul Karim and others [(2010) 18 BLT (AD) 455],** the Appellate Division of the Supreme Court held that it is unfortunate that the High Court Division not only entertained an application of a fugitive but also allowed him opportunity to surrender before it in its writ jurisdiction. The High Court Division illegally issued the Rule and passed the interim order in utter abuse of article 102 of the Constitution and the principle of justice. The application at the instance of a fugitive not being entertainable the rule must be discharged.

7. In **Mr. Abul Hashem Vs. International Oil Limited and others [(2010) 18 BLT (AD) 469],** the Appel ate Division of the Supreme Court held that it is true that the and belongs to the Chittagong Port Authority and the promise of other respondents are all tentative and therefore cannot give rise to legitimate expectation but fact remains that the writ petitioner was persuaded to pay Tk. 7,68,922.47 and the writ petitioner paid the same which was accepted by the Chittagong Port Authority and as a result Amin Agencies Limited got rid of the eviction order. Fact also remains that the writ petitioner filled up the ditch and the low lying area by filling earth within the full knowledge of the Chittagong Port Authority and Amin Agencies Limited. The present leave petitioner has stepped into the shoes of Amin Agencies Limited and therefore the respondents now cannot deny the writ petitioner his prayer for granting lease in respect of 0.75 acre of land. It is not necessary to enter into the egal polemic of legitimate expectation or promissory estoppel but equity demands that where a promise is made by a person knowing that it would be acted upon by the person to whom it is made and, in fact it is so acted upon, it is inequitable to allow the party making the promise to go back upon it.

8. In **Md. Abdul Motaleb Sarker and others Vs. Md. Laskar Ali and others [(2010) 18 BLT (AD) 311],** the Appellate Division of the Supreme Court held that the subject matter of the suit is shifting of the office of Shihara Union Parishad from its present site and the pla ntiff sought for declaration that the order dated 10.04.1986 passed by the Government shifting the same to the new site is illegal, void and inoperative: site selection is the business of the Government and relates to policy matter concerning the administration and the petitioner as plaintiff had no locus standi to challenge such a policy decision of the Government.

9. In **Shahabuddin Chisti Vs. Rajdhani Unnayan Ktripakhya and another [(2010)18 BLT (AD) 501],** the Appellate Division of the Supreme Court held that an ouster of jurisdiction of the Civil Court under the provision of Section 14 of the Building Construction Act, is a bar to maintain any suit against the order passed by RAJUK under the Act providing a provision for an appeal therein. In the instant case, the appellant has not availed the said provision of appeal instead filed the suit which is not maintainable as the special provision provides a special remedy for the purpose and the person being dissatisfied with any order of RAJUK could prefer appeal in the special forum for that purpose.

10. In **SM Emdadul Hossain Vs. Jinnur Hossain and another [(2010)15 BLC (AD) 146],** the Appellate D vision of the Supreme Court held that on plain reading of the provisions of sections 138 and 139 of the Negotiable Instruments Act, 1881 it appears that when a cheque is given for discharge of any "debt or liability" and the cheque is dishonoured the issuer of the cheque is liable for the consequence under section 138 of the Negotiable Instruments Act and further it appears that the

very cheque tself has a "presumptive valce as to debt or liability". Whether any debt or liability at all exits or not is a question to be determined in the proceed'ngs under section 138 of the Negotiable Instruments Act. One of the ingredients for initiating a proceeding under section 138 of the Negotiable Instruments Act is refusal to honour a cheque and when there is such prima facie case, the proceeding cannot be quashed, as has been held in the case of Md. Monjur Alam Vs. State reported in 2002 BLD (AD) 228 = 55 DLR (AD) 62.

11. In **Saudi Arabian Air lines Corporation Vs. Saudi Bangladesh Services Company Ltd. [(2010)15 BLC (AD) 186],** the Appellate Division of the Supreme Court held that the High Court Division rightly considered lack of deliberations between the arbitrators in this case. The Court further found that the High Court Division rightly considered "public policy" in the matter and correctly appreciated the principle laid down n Hindustan Petroleum Corporation Ltd Vs. Environmental Engineers Ltd. reported in (2001) 2 Comp 79 (Bom).

    In the present case the arbitral tribunal was composed of three arbitrators and it was incumbent upon the arbitrators to make it manifest that there was discussion between the arbitrators before the award was made but from the plain reading of the proceedings it appears that one of the arbitrators was excluded totally from the process of deliberation before the award was made. The High Court Division was right in holding that the 3rd arbitrator was neither consulted nor g ven an opportunity by the Chairman to deliberate and express his views on the issues before making and signing the award in question.

12. In **City Sugar Industries Ltd. and others Vs. Human Rights and Peace for Bangladesh and others [(2010) 62 DLR (AD) 428],** the Appellate Division of the Supreme Court held that Public Interest lies in protecting the rivers from encroachments and pollution by all means. The maxim 'Salus Pupuli Suprema lex' should be put in the imperative i.e. 'Salus Pupuli Suprema lex esto' let the safety of the people be the Supreme Law.

13. In **Anti-Corruption Commission Vs. Dr. Mohiuddin Khan Alamgir and others [(2010) 62 DLR (AD) 290],** the Appellate Division of the Supreme Court held that the words 'মামলা দায়ের' means institution of a case by submission of charge sheet by an officer of the Commission, before the concerned Court and certainly not a First Information Report as envisaged under section 154 of the Code of Criminal Procedure or a complaint (অভিযোগ) as envisaged under Rule 3 and 4 of the of the Anti Corruption Rules, 2007. The irresistible conclusion is that no sanction will be required to file a complaint (অভিযোগ) either with the Commission or with the police. But sanction from the Commission shall be required both under the unamended and the amended section 32 of the Anti Corruption Act, 2004 before institution of a case (মামলা দায়েরের ক্ষেত্রে) in the concerned Court.

14. In **Anti Corruption Commission Vs. Dr. H.B.M. Iqbal Alamgir and others [(2010) 30 BLD (AD) 37],** the Appellate Division of the Supreme Court held that the power of judicia review in the nature of writ of Certiorari is limited to judicial and quasi-judicial bodies, as such, this jurisdict on can be used in the narrow sense to declare as to whether the act done or proceeding taken is without lawful authority and is of legal effect or not. In exercising this power of judicial review the court does not assume the function of an appellate authority, far less pass an interim order in a criminal matter.

15. In **H.R.C. Shipping Limited Vs. M.V. Lady Fatima and others [(2010) 15 MLR (AD) 113],** the Appellate Division of the Supreme Court held that ships carrying goods are exempted from liabi ity when the damage is caused by Act of God. The suit for damage against ships shall have to be fi ed within one year from the date of delivery of the goods or the purported date of delivery of goods.

16. In **Chairman, Governing Body, Bangladesh Rifles School and College Vs. Md. Gholam Kibria and others [(2010) 15 MLR (AD) 497],** the Appellate Division of the Supreme Court held that the law is very much clear that writ jurisdiction can not be invoked against a person who is not in the service of the Republic or a local authority or organization not established by any law. The appellant school and college is a private institut on managed by the BDRs and as such the Apex Court held the writ petition is not maintainable.

17. In **Gopal Chandra Vs. Mitali Rani Chandra [(2010) 15 MLR (AD) 23],** the Appellate Division of the Supreme Court held that according to Hindu Law, a Hindu wife is inseparable from the husband and they are obliged to live together as husband and wife till last day of their life. Any deviation of their relationship and conduct due to the behavior of the husband makes the husband liable to bear the consequences to the right accrued to the wife under the marriage. Hindu marriage being a sacrament is inseparab e. When the living with husband is not safe and the wife is neglected by the husband, she is entitled to separate residence and maintenance under Section 2 of the Hindu Women's Right to Separate Residence and Maintenance Act, 1946.

18. In **National Board of Revenue Vs. Advocate Zulhas Uddin Ahmed and others [(2010) 15 MLR (AD) 457],** the Appellate Division of the Supreme Court held that the intent and spirit of article 18 of the Constitution is to provide minimum health care/medical service to the citizens in order to maintain and improve public health being the primary duty and obl gation of the State. In that view of the matter, the imposition of VAT on the impugned medical services is not warranted and contrary to the fundamental principle of state policy. Moreover, article 32 of the Constitution provides for protection providing not to deprive a citizen's life and personal liberty except in accordance with law.

19. In **S.M. Hossain Vs. Lahazuddin and others [(2010) 7 ADC 206],** the Appellate Division of the Supreme Court held that a plaint may be re,ected under Order 7, Rule 11 from the plain reading of the plaint. But in exceptional cases a plaint may also be rejected under inherent power of the Court under Section 151 of the Code when the suit is barred by law.

20 In **Warm-Me Wollen Mills Ltd. Vs. The Government of Bangladesh [(2010) 7 ADC 420],** the Appellate Division of the Supreme Court held that the agreement for lease is not a sovereign act on behalf of the Government but an ordinary contract for lease. The respondent terminated the lease by giving a notice for 90 (ninety) days, invoking clause 14 of the Agreement. The legality of such termination can be decided on taking evidence in a civil suit but not under the writ jurisdiction of the High Court Division.

21. In **Abdul Mannan Bhuiyan Vs. The State [(2010) 7 ADC (AD) 428],** the Appellate Division of the Supreme Court held that a conviction could be given to an accused person relying upon his confession if it is found true and voluntary. It is now settled that if a confession is found to be true and voluntary, and inculpatory n nature, it can in law validly form the sole basis of the conviction of the maker and there is no need at all to look for further corroboration. A retraction of a confession has no bearing whatsoever upon the question whether it is true and voluntary.

Leading Decisions of the Supreme Court of Bangladesh in the year 2011

In view of Article 111 of the Constitution of People's Republic of Bangladesh, the law declared by the Appellate Division of the Supreme Court of Bangladesh is binding on all courts within the territory of Bangladesh including the High Court Division of the Supreme Court. Every judgment delivered by the Appellate Division has its own significance. Brief note of some judgments, delivered during the year 2011, is given below:

1. **Superintendent Engineer, RHD Vs. Md. Eunus and Brothers (Pvt.) Ltd, 31 BLD (AD) 1:** The contract was an ordinary commercial contract or contract of general nature or a pure and simple contract. So, the relief sought and granted by the High Court Division is not legally available to the respondent in respect of the alleged confidential inter-departmental communication in the process of eligibility or evaluating or considering any bid or for failure to fulfill any obligation under a pure and simple consequential or ordinary contract entered into between the appellant and the respondents.

2. **Government of Bangladesh represented by Secretary, Ministry of Jute, Secretariat Building, Dhaka Vs. Helal Jute Press Ltd. and others, 8 LG (2011) AD 70:** A court will decline to exercise its writ jurisdiction when the disputed question of fact cannot be reasonably resolved on the facts pleaded and documents produced before the Court.

3. **Dhaka Leather Complex Ltd. Vs. Sikder Construction Ltd. and another, 8 LG (2011) AD 75:** An omission to file the depositions, documents and order sheets of the arbitration proceedings in the trial Court by the umpire is a mere irregularity which will not affect the merit of the case in making the award Rule of the Court.

4. **Md. Lokman @ Lokman Vs. The State, 8 LG (2011) AD 81:** The trial Court should apply its judicial mind in considering the materials on record to come to a decision as to whether charge should be framed against a particular accused person or not. When the Court after hearing the prosecution and the accused and on perusal of the materials on record is of the view that the accused presumably appears to have committed the offence as alleged, it shall frame charge against the accused under the relevant provisions of law without assigning any elaborate reasoning. But if the court finds insufficient materials on record to proceed against the accused it shall discharge him with elaborate reasonings.

5. **The Chairman, Rural Electrification Board (REB) Vs. Md Awlad Hossain and others, 8 LG (2011) AD 85:** When a departmental proceeding is initiated against an employee and a second show cause notice has been issued with a view to inflicting lower major penalty he should not be awarded comparatively higher major penalty without giving him any opportunity to show cause for infliction of such higher major penalty following the principle of natural justice.

6. **Shah Sekander Molla Vs. New Saguranal Tea Co. and others, 8 LG (2011) AD 103:** Transfer of a case from one Court to another should not be lightly dealt with because it is a serious matter which indirectly casts a doubt on the integrity or competency of the learned Judge from whom the matter is transferred.———(Para 8)

   In order to transfer a suit the convenience which is to be taken into consideration by the Court is the convenience of both the parties not any one of them. ———(Para 12)

7. **State Vs. Babul Mia, 63 DLR (AD) 10:** It is a mandatory requirement that after recording a confessional statement the recording Magistrate is required to make a memorandum to the confession containing a clause to the effect that he had warned the accused that he was not bound to make a confession, that if he makes a confession, it might be used against him; that the statement was true and voluntary; that it was recorded as per version of the maker and that it was read over to the maker after his statement and that it was the true and correct version and it contained a full and true account of statement made by the maker.

8. **Amena Khatun Vs. Chairman, Court of Settlement and others, 63 DLR (AD) 1:** The enlistment of a property under section 5(1) of the Abandoned Buildings (Supplementary Provisions) Ordinance raises a presumption of law that the property is abandoned under section 5(2) and that presumption will continue until the claimant proves otherwise.

9. **Govt. of Bangladesh Vs. Tauhid Uddin Ahmed & Ors., 31 BLD (AD) 128:** কর্মরত কোন কর্মকর্তা ২০০২ সনের বিধিমালা অনুসারে উপ-সচিব পদে পদোন্নতি লাভ করিলেন, তাহা যে কোন ক্যাডার হইতেই হউক না কেন, তিনি তখন একজন পরিপূর্ণ উপ সচিব। তাহার পূর্বের ক্যাডার পরিচয় তখন বিলুপ্ত হইবে। তিনি সচিবালয়ের উচ্চতর উপ সচিব পদে তখন অধিষ্ঠান। সেই অবস্থা (status) পরিবর্তন জন্য সকল উপ-সচিবের সহিত এক শ্রেণীভুক্ত হইয়া সম-অধিকার পাইয়া তিনি পরবর্তী উচ্চতর যুগ্ম-সচিব পদে বা পরবর্তীতে অতিরিক্ত সচিব পদে পদোন্নতি লাভ করিবার জন্য বিবেচিত হইবেন।

10. **Lt. Col. M.A. Mannan (Retd.) Vs. Social Investment Bank Ltd. & Ors., 31 BLD (AD) 124:** The judges have to honour the judicial office which they hold as a public trust. Their every action and their every word must show and reflect correctly that they hold the office as a public trust. The greatest strength of the judiciary is the faith of the people in it. Faith, confidence and acceptability can not be commanded; they have to be earned.

11. **Fariduddin Mahmud Vs. Md. Saidur Rahman, 63 DLR (AD) 93:** A writ of certiorari may be issued in exceptional cases, where the proceedings of the Tribunal are absolutely void or where the Tribunal has purported to act in a judicial capacity which is not properly constituted or where there is error apparent on the face of the record or where the Tribunal's conclusion is based on no evidence on record whatsoever, or where the decision of the Tribunal is vitiated by malafide, or the Tribunal has acted without jurisdiction or acted in excess of jurisdiction or acted contrary to the fundamental principles or acted malice in law.

12. **Malik Mehdi Kabir and another Vs. Rabitat-Al-Alam-Al-Islami and others, 63 DLR (AD) 109:** The acquisition of the immovable property has to be made for public purpose and not otherwise. In this particular case, it is seen that the acquisition has been made not for any public purpose rather for private purpose i.e. for office complex of a Non-Government Organization and the acquisition is not needed for public purpose.

13. **Dr. Muhiuddin Khan Alamgir Vs. Bangladesh and Ors., 19 BLT (AD) 191:** It is well settled that writ petition under Article 102 of the Constitution of the People's Republic of Bangladesh is not maintainable against any step in the process of action like acceptance or rejection of nomination paper of a candidate.

14. **Riaz Uddin Khan (Md), Advocate Vs. Mahmudur Rahman, 63 DLR (AD) 29:** The expression 'law' is to be understood from the definition given in Article 152 read with Article 111 of the Constitution. One should know that the law of the land has also been regarded to be that which is declared by the Appellate Division. Thus, where a provision in the law, relating to contempt imposes reasonable restr ctions, no person can take the liberty of scandalizing the authority of the Court.

A fair criticism of the conduct of a judge may not amount to contempt if it is made in good faith and in public interest. While publishing any article over sensitive organ of the State, such as, the judiciary, the media should guard that the correct informative news is published without scandalizing the judiciary as a whole or attacking a judge because the judges by the nature of their work cannot express their views or defend any allegation by making statement to the media which is enjoyed by others.

15. **State Vs. Md. Monirul Islam alias Nirab, 16 BLC (AD) 53:** In proper cases anticipatory bail may be granted but for a very short period, such as between 2 to 4 weeks and not for a long period of time. It must be remembered that sooner he appears before the Magistrate the better.

16. **The State Vs. Mukta Khan and another, 31 BLD (AD) 110:** Any decision passed by the Appellate Division is binding upon all Courts in Bangladesh and no Judge can ignore it. If he does it may not only be contemptuous but also tantamount to violation of the Constitution.

17. **Tarique Rahman Vs. Government of Bangladesh, 63 DLR (AD) 18:** Article 35(1) of the Constitution envisages the prohibition on conviction or sentence under an "ex post facto law".

18. **Tarique Rahman Vs. Government of Bangladesh, 8 LG (2011) AD 90:** Ain of 2002 being inserted in the schedule to the Anti Corruption Commission Act 2004 (the ACC Act, 2004), the procedure in respect of inquiry, investigation, conducting prosecution and holding trial shall be governed under the provisions of the ACC Act, 2004.

19. **The Privatization Commission Vs. Golam Mostafa & Ors., 31 BLD (AD) 173:** A party cannot both approbate and reprobate; he cannot say at one time that a transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another say that it is void for the purpose of securing some further advantage.

20. **Sonali Bank Limited Vs. Prime Global Limited, 63 DLR (AD) 99:** The decree was passed without any service of summons or even without any attempt to do so. As such, it is a nullity in the eye of law and it is imperative upon any Court of law, which is in seisin of the matter, to hold so, even without invoking the provisions of section 19 of the Artha Rin Adalat Ain or rule 13 of Order IX of the Code of Civil Procedure which envisages at least a service, and sub-section (1) of section 19 of Artha Rin Adalat Ain also envisages a service of summons upon the defendant.

    Since on the admitted facts the ex-parte decree against the defendant No. 2 is a nullity, the judgment and decree passed by the High Court Division cannot sustain.

21. **Tarique Rahman Vs. Government of Bangladesh, 63 DLR (AD) 162:** The grounds taken for review of the impugned judgment are nothing but a device of rehearing of the whole civil petition for leave to appeal which is not permissible under Article 105 of the Constitution read with Order XXVI of the Supreme Court of Bangladesh (Appellate Division) Rules, 1988.

    In order to review a judgment there must be an error apparent on the face of the record and that this error is so apparent and manifest and clear that no court of law would permit such an error to remain on the record. The error must not only be apparent but must also have a material bearing on the face of the case.

Leading Decisions of the Supreme Court of Bangladesh in the year 2013

In view of Article 111 of the Constitution of People's Republic of Bangladesh, the law declared by the Appellate Division of the Supreme Court of Bangladesh is binding on all courts within the territory of Bangladesh including the High Court Division of the Supreme Court. Every judgment delivered by the Appellate Division has its own significance. Brief note of some judgments, delivered during the year 2013, is given below:

1. DR. Tapan Kumar Dey vs. State, 65 DLR (AD) 1: The High Court Division ... took the view that the very failure on the part of the petitioner to submit wealth statement within the period as was asked for itself constituted a separate offence within the meaning of the first part of section 26(2) (Ka) of the (Durnity Daman Commission) Ain, 2004, therefore, he was liable to be proceeded with. We do not find anything wrong with the finding of the High Court Division. (Para 8)

2. Siddique Ahmed vs. Government of Bangladesh and others, 65 DLR (AD) 8: The supremacy of the Constitution was unqualified, it is unqualified and it shall remain unqualified for all time to come. (Para 141)

3. Siddique Ahmed vs. Government of Bangladesh and others, 65 DLR (AD) 8: The Constitution being the solemn expression of the will of the sovereign people of Bangladesh is sacrosanct and immutable and all organs of the Republic owe its existence to the Constitution. It is supreme in all respect. The Martial Law Proclamations, Regulations and Orders are non est before it. (Para 143)

4. Siddique Ahmed vs. Government of Bangladesh and others, 65 DLR (AD) 8: No authority in Bangladesh can oust the jurisdiction, powers and functions of the Supreme Court granted under the Constitution. (Para 145)

5. Siddique Ahmed vs. Government of Bangladesh and others, 65 DLR (AD) 8: The Constitution is the supreme law of the country and the National Assembly, all Divisions and branches of the executive including the armed forces and the Judiciary including the Supreme Court owe their existence to the Constitution of the People's Republic of Bangladesh. It is further unhesitatingly declared that any law, Proclamation, Regulation or Order, inconsistent with the Constitution, that law, Proclamation, Regulation or Order, no matter who made it, is void, and non est in the eye of law. (Para 148)

6. Siddique Ahmed vs. Government of Bangladesh and others, 65 DLR (AD) 8: The Constitution is the Supreme law and its any violation is void and illegal and remains so for all time to come The plea of waiver or acquiescence is not available in respect of violation of any law. If it is violated, the Court is bound to say so, no matter when it is raised. There is no period of limitation, no waiver, no acquiescence in this respect. (Para 177)

7. Siddique Ahmed vs. Government of Bangladesh and others, 65 DLR (AD) 8: There is no law called 'Martial Law' and there is no authority called the 'Martial Law Authority' in our jurisprudence. ... The Martial Law Proclamations, Martial Law Regulations, Martial Law Orders are all illegal, void and non-est in the eye of law and could not be ratified or confirmed even by the Parliament through Fifth Amendment of the Constitution. (Para 243)

8. Siddique Ahmed vs. Government of Bangladesh and others, 65 DLR (AD) 8: Our Parliament is supreme but unlike the Westminster Parliament, its supremacy is subject to the Constitution, similar to that of the Congress of the United States. Our Parliament can make and unmake any law but within the bounds of the Constitution which is the embodiment of the will of the sovereign people of Bangladesh. It can also ratify any Ordinance made by a lawfully elected President, following a proper and lawful procedure but cannot ratify and confirm any illegal Proclamation, Regulation and Order by whomsoever it was made. (Para 253)

9. Amir Hossain Sowdagar vs. Md. Harunur Rashid and others, 65 DLR (AD) 130: Equity does not give any special remedy to a party who has chosen not to perform his promise. Performance of one party's promise may have to be completed or tendered before he can sue on the other's reciprocal promise. No man can complain of another's failure to do something, which he has himself made impossible This principle is not confined to acts of direct or forcible prevention, which are neither frequent nor probable, but extend to default or neglect in doing or providing anything which a party ought under the contract to do or provide, and without which the other party cannot perform his part. Therefore, there is no doubt that the defendant was in breach of the terms of agreement and abruptly cancelled the agreement and forfeited the advance money. Where one party is guilty of a breach which goes to the root of the contract, the other party may elect either to affirm the contract, i.e. to regard it as still binding or to treat the breach as a repudiation of the contract which discharges him from further liability. (para-9)

10. Metro Makers and Developers Limited vs. Bangladesh Environmental Lawyers' Association (BELA) and others, 65 DLR (AD) 181: Right to life includes right to protection and improvement of environment and ecology, even if there could not have been any law imposing restriction relating to the use of the nal lands in the areas in question which operate as reservoir of flood and rain water. If these lands are filled up it will cause serious problem in draining out water resulting from flood and rain and the affected people can compel the authorities through judicial review to take steps to preserve and protect health, environment and ecology in the Metropolitan areas. The fundamental right of the third party purchasers cannot override the fundamental right of overwhelming number of residents of the metropolis under articles 31 and 32 of the Constitution. (Para 166)

11. Government of Bangladesh and others vs. Md. Badal and another, 65 DLR (AD) 246: When specific criminal cases had already been started over the dispute as detailed hereinbefore, the High Court Division should not have entertained the writ petitions and the Rules issued therein should have been discharged on the ground of maintainability. (para 20)

12. Jamuna Television Ltd. and another vs. Government of Bangladesh, 65 DLR (AD) 253: Power granted under Article 104 of the Constitution is an important constitutional power granted to this Division to protect the citizens. While exercising its inherent power under Article 104 this Division cannot override the statutory provisions. (para 65)

13. Mahbub Ahmed Chowdhury vs. Chief Election Commissioner and Others, 65 DLR (AD) 283: Parliament has plenary power of legislation over all subjects excepting those in respect of which the Constitution has delegated its power to some other authority or in respect of any such subject matter about which limitation has been imposed by the other provisions of the Constitution. In other words, the plenary powers of legislation of the Parliament are limited by the fundamental rights guaranteed by Part III of the Constitution. Therefore, Parliament cannot enact any legislation contrary to the provisions of the Part III of the Constitution relating to fundamental rights. (Para 13)

14. Monowarul Huq. vs Bangladesh, 33 BLD (AD) 49: Where the government has taken a policy for leasing out the vessels in open auction, the Court will not interfere with the matters of government policy. In such situation, the courts of law have to be very wary and must exercise their jurisdiction with circumspection for, they must not transgress into the realm of policy making, unless the policy is inconsistent with the Constitution and the laws or the action is arbitrary, irrational or in abuse of power, the Court will not interfere with the matters. (Para-17)

15. Secretary, Ministry of Establishment and others. vs. Amzad Hossain and others, 33 BLD (AD) 303: The prayer to the effect "and/or such other of further order or orders as your Lordships may deem fit and proper" do not authorise a writ Court to give relief beyond the Rule issuing order, such prayer authorises the writ Court to give any incidental relief or reliefs which may follow from the main relief according the Rule issuing order.

16. Narendra Chandra Das and another vs. Sree Sree Gopal Bigraha and another, 21 BLT (AD) 1: A shebait does not acquire any title to the Debutter Property. The Debutter Property cannot be alienated by him except in case of unavoidable necessity. ...(T)he shebait can reside in the suit property for the purpose of performing religious rites. It does not create any title in his favour. (Para 14)

17. Humayun Hossain Khan vs. Government of Bangladesh and others, 18 MLR (AD) 5: Where the language of a statute is plain and admits of but one meaning, the task of interpretation hardly be said to rise. It is also a rule of interpretation of a statute that where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense result may be. (Para 13)

18. Humayun Hossain Khan vs. Government of Bangladesh and others, 18 MLR (AD) 5: Reading section 47 and sub-section (3) of section 60 of the Ain, 2003 together, it does not appear to us that any bar has been put by the legislature either upon the financial institutions to pursue the suit on the claim more than 200% over the actual loan disbursed to a loanee here the appellant filed before 1st May, 2004 or upon the Artha Rin Adalat to entertain any such claim made by a financial institution like the plaintiff on the allowable bank interest in vogue at the relevant time or as per terms of the contract entered into between the parties. What appears to us is that a clear discretion/option has been given upon a financial institution to fall back upon the provisions of section 47 of the Ain, 2003 in waiving claim of its dues more than 200% over the actual loan amount in respect of the suits filed before the said section came into force on 1st May, 2004. So the Artha Rin Adalat could not force the plaintiff-bank to exercise such discretion/option in favour of the loanee, the appellant herein. (Para 12)

Leading Decisions of the Supreme Court of Bangladesh in the year 2014

In view of Article 111 of the Constitution of People's Republic of Bangladesh, the law declared by the Appellate Division of the Supreme Court of Bangladesh is binding on all courts within the territory of Bangladesh including the High Court Division of the Supreme Court. Every judgment delivered by the Appellate Division has its own significance. Brief note of some judgments, delivered during the year 2014, is given below:

1. Esrarul Huq Chowdhury vs. Md. Amir Hossain Advocate & another, 66 DLR (AD) 1: Misconduct envisages any instance of breach of discipline. It means improper behaviour, intentional wrongdoing or deliberate violation of a rule of standard of behaviour. The term "misconduct" is incapable of a precise definition. It may mean delinquency in its performance of duty and its effect on the discipline and the nature of duty. In other words it means improper and wrong behaviour which is willful in character. It may involve moral turpitude, but is not a mere error of judgment, carelessness or negligence in performance of duty. (Para 36)

2. Ali Amjad Khan (Md) vs. Md. Habibullah Dawn and others, 66 DLR (AD) 28: A transferee pendente lite is not entitled to the benefit of the procedure under Rules 99 and 101 of Order XXI of the Code of Civil Procedure. (Para 15)

3. Rana Kaiser Siddiq vs. Bangladesh Chemical Industries Corporation and others, 66 DLR (AD) 31: A Contractual right is not enforceable in exercise of writ jurisdiction. (Para 11)

4. State vs. Md. Ibrahim Ali, 66 DLR (AD) 33: The requirement of law is therefore that if and when charge is altered or added at any time before judgment is pronounced, the alteration or addition must be read and explained to the accused. (Para 12)

5. State vs. Md. Ibrahim Ali, 66 DLR (AD) 33: The Provisions of section 222(2) read with section 234 (1) require that if there are more than one offences committed over a period of more than 12 months then the offences may not be charged in one charge, whereas section 6 (1B) provides that any number of offence punishable under the Criminal Law Amendment Act irrespective of the period over which the offence was committed, may be tried at one trial. Clearly, therefore, the provision in the Criminal Law Amendment Act is not consistent with the provision of the code of Criminal Procedure thereby ousting the applicability of the provisions of the Code in proceedings before the court of Special judge. Hence all the offences committed over any length of period of time could be tried in one trial upon framing one charge. (Para 20)

6. State vs. Md. Ibrahim Ali, 66 DLR (AD) 33: In any event, as has been pointed out earlier, defect in framing of charge cannot be a ground for acquittal of the accused. The only time when any proceeding can be quashed for material error in the framing of charges is when the Court forms the opinion that the fact of the case are such that no valid charge could be framed against the accused in respect of the facts proved. (Para 23)

7. Shamsul Kabir Humayun Reza vs. Anwarul Hasan and others, 66 DLR (AD) 37: A Judge should not be emotional and should not embark upon making unnecessary observations/comments and remarks, such observations/comments and remarks may give bad message to the litigants and the public, at large, as to the independence of judiciary and dispensation of even handed justice by it. While disposing of a matter, a Judge must confine himself to the pleadings of the parties and answer the issues which would emerge from the pleadings in the light of the evidence adduced and materials placed before it and the law governing the field. A Judge must refrain himself from making unnecessary observations/comments and remarks. (Para 67)

8. British American Tobacco Bangladesh Company Ltd vs. Begum Shamsun Nahar, 66 DLR (AD) 80: A person can be liable for tort as well is damages may be claimed against him for such wrong doing as well as against an organization or establishment if it fails to ensure the prevention of sexual harassment and bullying to a woman, where she can work with honour and dignity and without being harassed or disturbed by her male boss or other male colleagues. (Para 13)

9. British American Tobacco Bangladesh Company Ltd vs. Begum Shamsun Nahar, 66 DLR (AD) 80: Where the existence of the cause of action is required to be determined by adducing evidence, plaint cannot be rejected under Order VII, rule 11. (Para 13)

10. Durnity Daman Commission and another vs. Dr. Khandaker Mosharraf Hossain and another, 66 DLR (AD) 92: The petition must disclose explicitly and specifically what is the basis of his apprehension of not to be treated fairly. An omnibus statement that he is a political personage and the Magistrates or the lower court/tribunal Judges, as the case may be are controlled by the government (which has neither factual nor legal basis these days) is not enough. Equally well, the Judges of the High Court Division concerned must also assign reason for their satisfaction on this primordial point, which must be reckoned to be the door opener. (Para-21 and 22)

11. Zakir Hossain and another vs. Md. Shahnewaz and others, 66 DLR (AD) 98: An appeal against a preliminary decree is filed under section 96 of the Code of Civil Procedure and that against the final decree under section 97 of the Code of Civil Procedure. If an appeal is filed against the preliminary decree and if the preliminary decree is modified or set-aside then the final decree falls through. (Para 7)

12. Zakir Hossain and another vs. Md. Shahnewaz and others, 66 DLR (AD) 98: When no appeal is preferred against the final decree and only the preliminary decree is appealed against but a copy of the final decree has been placed on the record of the appeal it is the duty of the appellate Court in dealing with the appeal to give necessary and consequential directions regarding the final decree (Para 12)

13. Monir Hossain Md (Moni) and another vs. Md. Yousuf and Others, 66 DLR (AD) 100: If a tenant becomes defaulter by failing to comply with the mandatory provision of law, he always remains defaulter unless the landlord expressly waive that default, and once a tenant is found to be defaulter, he is liable to be evicted. (Para 10)

14. Ramesh Chandra Adhikari vs. Bulbuli, 66 DLR (AD) 104: A uniform and comprehensive system governing all Hindus containing a series of coherent provisions carefully considered after having gone thorough by eminent pundits and researchers and law commission a codification of Hindu Law of marriage and succession should be enacted. Time has come for the legislators to think about the codification of the Hindu Law of Marriage and Succession in Bangladesh. (Para 23)

15. Ramesh Chandra Adhikari vs. Bulbuli, 66 DLR (AD) 104: Marriage under the traditional Hindu Law is holy union for the performance of religious duties. It is a sacrament for the purification of the body from inherited taint. It is not a contract. (Para 23)

16. Mehedi Hasan @ Modern (Md) and others vs. State, 66 DLR (AD) 111: To bring an omission within the periphery of section 32 of the Penal Code, it is incumbent that the omission must be illegal and the onus is surely upon the prosecution to show that omission (here failure to rescue Trisha while drowning) which is being treated as an act, is either an offence or is prohibited by law or which furnishes ground for a civil action as stipulated in section 43 thereof. But we could not lay our hand on any provisions of the Penal Code or any other law, which has termed the omission on the part of a person(s) (hare the appellants) to rescue a drowning person (here Trisha) as illegal. (Para 68)

17. Mehedi Hassan @ Modern (Md) and others vs. State, 66 DLR (AD) 111: "অপহরণ" has been made punishable under section 7 of the Ain, 2000. As per definition given in the Ain, 2000 "অপহরণ" shall be

complete the moment a person (নারী/শিশু) is compelled to go from one place to another place either by force or by allurement or by enticement (কুসলাইয়া) or through misunderstanding or by threat. (Para 70)

18. Hasan Arif Ullah vs. Nilufar Yesmin @ Reba & another, 34 BLD (AD) 8: An accused cannot be dragged to Court for years together and he/she has right to see the end of the trial as expeditiously as possible and at the same time, an offender cannot go unpunished on the plea of non-examination of the prosecution witnesses if the prosecution does not take effective step to secure the attendance of the witnesses. The State being the prosecutor in a criminal trial, it is its duty to secure the attendance of the witnesses and to take all necessary legal steps in that respect as provided in the Code. In the context, we also like to observe that mere issuance of a process for the attendance of a witness is not enough; the Court must see that the process so issued has been executed. (Para 11)

19. Mahbub Ahmed Chowdhury vs. The Chief Election Commissioner and others, 34 BLD (AD) 69: In order to determine the vires of the law or an enactment the Court must look to the substance not merely to the form of the legislation which includes the effect of the legislation and object or purposes of the legislation. (Para 39)

20. Md. Abu Hanifa vs. Md. Saiful Bashar and Others, 34 BLD (AD) 109: Under Section 11 read with Rule 8(2) of the Muslim Marriages and Divorces (Registration) Rules, 1975 notice is required to be served upon the Nikah Registrar before cancellation of license and it is also a fundamental principle of natural justice that no action shall be taken against any person without giving him any opportunity of being heard. (Para 7)

21. Syed Wahid Iqbal vs. Bangladesh & others, 34 BLD (AD) 213: Registrar, Co-operatives is empowered under Section 7 of the Samabaya Samity Ain, 2001 to delegate its power for the formation of the Election Committee for holding the election of Tangail Central Co-operative Bank Limited. There is no illegality in the order passed by the District Co-operatives Officer forming the Election Committee and the declaration of election result by the District Election Committee also does not suffer from any legal infirmity. (Para 11)

Supreme Court Medical Center

Leading Decisions of the Supreme Court of Bangladesh in the year 2015

In view of Article 111 of the Constitution of People's Republic of Bangladesh, the law declared by the Appellate Division of the Supreme Court of Bangladesh is binding on all courts within the territory of Bangladesh including the High Court Division of the Supreme Court. Every judgment delivered by the Appellate Division has its own significance. Brief note of some judgments, delivered during the year 2015, is given below:

1. BLAST & Others Vs. Bangladesh & Others, 1 SCOB [2015] AD 1: A provision of law which deprives the court to use of its beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore without regard to the gravity of the offence cannot but be regarded as harsh, unfair and oppressive. The legislature cannot make relevant circumstances irrelevant, deprive the court of its legitimate jurisdiction to exercise its discretion not to impose death sentence in appropriate cases. Determination of appropriate measures of punishment is judicial and not executive functions. The court will enunciate the relevant facts to be considered and weight to be given to them having regard to the situation of the case. Therefore we have no hesitation in holding the view that these provisions are against the fundamental tenets of our Constitution, and therefore, ultra vires the Constitution and accordingly they are declared void. (Para...50)

2. BLAST & Others Vs. Bangladesh & Others, 1 SCOB [2015] AD 1: Since we hold that Sub-Sections (2) and (4) of Section 6 of the Ain, 1995 and Sub-sections (2) and (3) of Section 34 of the Ain of 2000 are ultra vires the Constitution, despite repeal of the Ain of 1995, all cases pending and the appeals pending under the repealed Ain shall be regulated under the said law, but on the question of imposing sentence, the sentences prescribed in respect of those offences shall hold the field until new legislation is promulgated. I hold that there was total absence of proper application of the legislative mind in promulgating those Ains, which may be rectified by amendments. In respect of section 303 of the Penal Code, the punishment shall be made in accordance with section 302 of the Penal Code. It is hereby declared that despite repeal of Nari-O-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995, the pending cases including appeal may be held under the repealed Ain, while dealing with the question of sentence, the alternative sentences provided in the corresponding offences prescribed in the Nari-O-Shishu Nirjatan Daman Ain, 2000 shall be followed. (Para...52)

3. Bangladesh Vs. Md. Abdus Satter and others, 1 SCOB [2015] AD 17: There are two parts in clause (5) of Article 102 - the first part contains inclusionary provision and the latter part contains exclusionary persons against whom such rights cannot be claimed. This clause has not debarred the High Court Division in entertaining a writ petition against any decision of a court or tribunal but it has impliedly debarred the High Court Division in entertaining a writ petition against any decision of a court or tribunal established under a law relating to the defence services or any disciplined force or a tribunal established under Article 117 of the Constitution. Such member of a disciplined force can be an aggrieved person and may seek judicial review in the High Court Division subject of the condition attached by Article 45 of the Constitution. The fundamental rights available in Part III of the Constitution cannot be invoked by a member of a disciplined force if any law prescribed a provision limited for the purpose of ensuring the proper discharge of his duty or maintenance of that force. (Para... 6)

4. Bangladesh Vs. Md. Abdus Satter and others, 1 SCOB [2015] AD 17: Writ petitioners did not challenge any disciplinary action taken against them by the Inspector–General of Police. The authority did not give the directions in accordance with the Police Act or the Bengal Police Regulations or the Ordinance of 1969. The writ petitioners also did not challenge the propriety of the imposition of black marks upon them. They have challenged the embargo imposed upon them by the Police Headquarter, which directly affected their right to be considered for promotion to the next higher post. Clause (5) of Article 102 does not stand in their way of making an application under Article 102(1) of the Constitution subject to the provision of Article 45 of the Constitution. (Para... 9)

5. Bangladesh Vs. Shireen Pervin Huq and others, 1 SCOB [2015] AD 22: In view of the clear bar under article 47(3) of the Constitution read with article 102(3) thereof, the High Court Division had no jurisdiction to entertain the writ petition in question and the same not being entertainable, it ought to have summarily rejected the writ petition on the ground of its maintainability. It is true that the High Court Division has not said anything as to the vires of the sections of the Act, 1973 challenged in the writ petition, but it disposed of the same in the manner as quoted hereinbefore after making some observations as stated earlier; there may be a misgiving in the mind of litigant people that a writ petition challenging a provision of the Act, 1973 or any action of the International Crimes Tribunal, is amendable to the writ jurisdiction of the High Court Division under article 102 of the Constitution. Moreso, the learned Judges cannot arrogate to themselves as advisors and it was not an act of discreet on their part to advise the writ-petitioners to redress their grievance by invoking article 104 of the Constitution. (Para...7)

6. Maj. Gen. Abdus Salam (Rtd) Vs. Election Commission & anr, 2 SCOB [2015] AD 5: The most significant thing is that for the purpose of filing an election petition under article 49(1) of the RPO only the phraseology "candidate" has been used. In other words, a proposed "candidate" has been given the locus standi to file an application raising an election dispute. Admittedly the candidature of the election-petitioner was rejected by the Election Commission on the ground of being a defaulter, he is surely a person who was proposed as a candidate for election as a member of the Parliament of the Constituency in question. But the High Court Division failed to comprehend the proper meaning of "candidate" given in section 2(ii) of the RPO vis-à-vis article 49(1) thereof in observing that "the petitioner being a candidate of the 10th National Parliamentary Election did not act rather he was an intending candidate and wanted to become a candidate." And we hold that the petitioner being a proposed "candidate" for election as a Member of the Parliament for the Constituency in question, he had every locus standi to file the election petitions and those were maintainable in law. (Para 9)

7. Uttara Bank Ltd Vs Credit and Commerce Ins. (Saudi) Ltd & ors, 2 SCOB [2015] AD 8: Before this Appellate Division the defendant-appellant did not raise any question as to the correctness of the above concurrent findings of the courts of facts, rather it has raised a new plea to the effect that the plaintiffs could not prove that the defendant bank sold the said 152 travellers' cheques. But we are unable to accept this new defence plea at this stage specially in view of the pleadings of the contesting parties and the evidence adduced by them. (Para...10)

8. Orascom Telecom & another. Vs Kalipada Mridha & Others, 2 SCOB [2015] AD 12: There is no gainsaying the fact that each of the leave-petitioners has been charging revenue for playing the national anthem on the mobile phones. On consideration of the Rules, in general, we find that there is no scope for commercial use of the national anthem. Such commercial use of national anthem shows utter disrespect to the national anthem. Each of the petitioners herein should have refrained from commercial use of national anthem. In an open market economy, each of the leave-petitioners can promote its business but it can do so without offending any existing law of the country. (Para 16)

9. TATA Power Company Ltd Vs M/S Dynamic Construction, 2 SCOB [2015] AD 15: The arbitral award is generally not open to review by Courts for any error in finding on facts and applying law for the simple reason that it would defeat the very purpose of the arbitration proceedings. (Para 20)

10. TATA Power Company Ltd Vs M/S Dynamic Construction, 2 SCOB [2015] AD 15: Whenever an award is challenged before any Court, the Court, i.e. either District Court or as in this case the High Court Division, does not sit on appeal over the decision of the learned Arbitrator. Therefore, the scope of considering the merits of the case and factual aspects is again very limited. (Para 23)

11. BADC Vs Md. Abdur Rashid & Others, 2 SCOB [2015] AD 24 : The court would be slow from interfering with the economic decisions as it has been recognized that the economic expediencies lack adjudicative decision and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits. It is the administrators and legislators who are entitled to frame policies and take such administrative decisions as they think necessary in the public interest. The court should not ordinarily interfere with policy decisions, unless clearly illegal. (Para 22)

12. Prof. Dr. Motior Rahman vs. The State & another, 3 SCOB [2015] AD 1: Section 39 of the Penal Code defines the term voluntary, means a wilful omission to attend on the employer. Such willful omission must arise from something more than mere careless or negligence. It must be an omission of which the employee is conscious though he may not advert to the consequence. The legal contract must take shape of service for the helpless master or employer, for example, a curator of a lunatic, or a doctor and a nurse employed in the hospital, who may render himself liable to the penalty under this section if he agreeing to look after the patient, voluntarily deserts the patient or omits to attend the patient. The complainant was not the one who is neither a lunatic nor a bodily incapable person or has been suffering from a disease for which he has entered into a contract with the appellant to take care of him and in that view of the matter, the offence alleged in the complaint does not attract section 491 of the Penal Code. (Para 9 &10)

13. Rasheda Begum & Others vs. Abul Hashem & Others, 3 SCOB [2015] AD 5: The High Court Division was not also factually correct in finding that summons of the suit was not served upon defendant No.3, as report of the process server clearly showed that summons of the suit was served upon defendant No.3 by hanging and he gave report to that effect. Merely because the fact of service of summons upon defendant No.3 was not recorded in the order sheet, it may be through inadvertence which did not make the report of the process server as regards service of summons upon defendant No.3 ineffective or nonest. (Para 13)

14. Abdus Sobhan Munshi vs. Komada Daishya & Others, 3 SCOB [2015] AD 11: It is true that in this kabala dated 02.03.1997 it has been mentioned that for performing the Shradhya ceremonies of her parents Komoda sold this land to the plaintiff. But this recital only in the document is not enough to prove that actually there was legal necessity for transferring this land by Komoda-who, admittedly, had life interest only in the land in question. Evidence is necessary to prove that actually there was legal necessity for transferring this land by Komoda. (Para 15)

15. S. N. Kabir.vs. Fatema Begum & Others, 3 SCOB [2015] AD 16: The preamble cannot control the meaning and expression when the meaning of the expression is clear and ambiguous. The aid of the preamble can be taken if the meanings of the words to be interpreted are not clear and ambiguous. (Para 20)

16. S. N. Kabir.vs. Fatema Begum & Others, 3 SCOB [2015] AD 16: The words 'immoveable property' occurring in section 5 of the Ordinance include both agricultural and non-agricultural properties. There is no scope for encroaching upon the domain of legislature by importing the words 'rural area' in section 5 and addition of such words will amount to legislation by the judiciary which is not at all permissible. (Para 23)

17. Pubali Bank Limited vs. Abdur Rashid Miah & ors, 3 SCOB [2015] AD 24: The bank concerned being a company under the Companies Act, does not come within the ambit of article 102(5) of the Constitution. So, we are of the view that the Rule in the instant case ought to have been discharged on the same ground, especially when the same Bench had decided earlier that the employees of Pubali Bank Limited are not in the service of the Republic or of any Corporation, National Enterprise or Local Authority. (Para 8)

18. Pubali Bank Limited vs. Abdur Rashid Miah & ors, 3 SCOB [2015] AD 24: The subsequent amendment to the Public Servants (Retirement) Act 1974 will not be automatically incorporated in the Service Regulations of the Bank, until and unless the Bank chooses to adopt the same by amending the relevant Service Regulations. (Para 8)

Leading Decisions of the Supreme Court of Bangladesh in the year 2016

In view of Article 111 of the Constitution of People's Republic of Bangladesh, the law declared by the Appellate Division of the Supreme Court of Bangladesh is binding on all courts within the territory of Bangladesh including the High Court Division of the Supreme Court. Every judgment delivered by the Appellate Division has its own significance Brief note of some judgments, delivered during the year 2016, is given below

1. Bangladesh Legal Aid and Services Trust (BLAST) and another vs. Bangladesh, 68 DLR (AD) 1: The petitioner has no signif cant history of prior criminal activity and that he was aged 14 years at the time of commission of the offence and 16 years at the time of framing of charge. The petitioner has been in the condemned cell since 12-7-2001, that is more than 14 years. Considering all the aspects of the case, we are of the view that the death sentence of the petitioner be commuted to imprisonment for life. (Para...17)

2. Nurul Abser (Md) vs. Golam Rabbani and others, 68 DLR (AD) 4: The only remedy open to a person who wants to set aside an arbitral award is to file an application under section 42 of the Act, 2001 within sixty days from the date of receipt of the award and after the expiry of the period of sixty days as envisaged in the section, the award becomes enforceable within the meaning of section 44 thereof and thus, jurisdiction of the civil Court has impliedly, been barred if not expressly. In the context, we may also refer to section 9 of the Code which has clearly provided that the Courts shall have ¸urisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. (Para...16)

3. Nurul Abser(Md) vs. Golam Rabbani and others, 68 DLR (AD) 4: The Act, 2001 is a special law and it has been enacted with the sole purpose of resolving the dispute between the parties through arbitration and after an award is given by the Arbitrator(s), if it is allowed to be challenged in a civil suit, then the arbitration proceeding shall become a mockery and the whole purpose of the arbitration scheme as envisaged in the Act, shall fail. (Para...17)

4. Rajib Traders vs. Artha Rin Adalat & another, 68 DLR (AD) 15: Interest to be paid by the judgment debtor will have to be calculated according to the prevailing interest rate or rates, which may be different for different periods, from the time of filing of the suit till the payment of the decretal amount by the judgment debtor. (Para...15)

5. State vs. Dafader Marfoth Ali Shah & others, 68 DLR (AD) 13: The exercise of the power of doing 'complete justice' under article 104 is circumscribed by two conditions, (i) that it can be exercised only when Supreme Court otherwise exercises its urisdiction and (ii) that the order which Supreme Court passes must be necessary for dong "complete justice" in the cause or matter pending before it...the State or any other aggrieved person had opportunity to challenge the acquittal of accused persons from the charge of cr minal conspiracy as per statutory provisions, but they did not avail that opportunity and allowed a long period to be elapsed rendering that opportunity to appea time-barred and conferring the accused persons a right to be treated acquitted from the charge of criminal conspiracy. In the name of doing 'complete justice' this right of the accused persons now cannot be ignored. (Para...241)

6. State vs. Dafader Marfoth Ali Shah & others, 68 DLR (AD) 13: Doing 'complete justice' does not contemplate doing just ce to one party by ignoring statutory provisions and thereby doing injustice to the other party by depriving him of the benefit of law. If a valuable right is accrued to the other side this fact should not be ignored in exercising the power of doing 'complete justice'. (Para...239)

7. State vs. Dafader Marfoth Ali Shah & others, 68 DLR (AD) 13: Where there is no FIR or where the FIR cannot be proved in accordance with law in that case also the court will not detract the testimony of the witnesses which w.ll have to be assessed on its own merits and the case is to be assessed on merit on the basis of the evidence adduced before it. (Para...221)

8. State vs. Dafader Marfoth Ali Shah & others, 68 DLR (AD) 13: One part of evidence of a witness even if is re¸ected the other part of the evidence of the same witness may be accepted. (Para...222)

9. State vs. Dafader Marfoth Ali Shah & others, 68 DLR (AD) 13: It is settled law that if a pa pable illegality is apparent in the trial Court's judgment while hearing an appeal from conviction, the appellate court can pass appropriate conviction for ends of justice on reappraisal of the evidence on record. (Para...116)

10. Hossain Shahid Chinu vs. Abdul Wahab & others, 68 DLR (AD) 103: The suit land is not an undivided dwelling house rather it is admittedly a commercial place on which petitioners and other co-sharers have been conducting their business treating the suit land as commercial premises. Since the suit land is not an undivided dwelling house but a commercial place an application under section 4 of the Partition Act cannot be invoked to buy out the share of a stranger purchaser in the suit land. (Para...19)

11. Moudud Ahmed vs. State, 68 DLR (AD) 118: Section 27 is independent of the notice served under section 26(1) of the ACC Act and the proceedings under section 27(1) have no nexus with the notice served by the ACC under section 26(1) of the Act demanding statement of assets and liabilities of the accused. (Para...78)

12. Moudud Ahmed vs. State, 68 DLR (AD) 118: A solitary, isolated and passing observation or an opinion expressed by the way in the judgment of this Division on a matter which was not before the court and which was not necessary in disposing of the criminal petition for leave to appeal for which no principle and precedent was cited and which was not even remotely a ratio of the judgment is nothing but an obiter dictum. (Para...69)

13. Moudud Ahmed vs. State, 68 DLR (AD) 118: The observations of this Division in paragraph 44 of the judgment in respect of service of notice dated 18-2-2007 under section 26 read with section 18(2) of the ACC Act upon the respondent No. 1 when he was in custody was not an issue in the case before the court. The very observation was not at all necessary for the decision of the case and does not relate to the material facts in issue. At best it can be said that it is an observation by the court on question suggested by the case before the court but it has not arisen in such a manner as to require a decision by the court. The foregoing observations made in 62 DLR (AD) 290 and 297 para 44 is contrary to the purpose and intendment of the ACC Act, 2004. (Para...69)

14. Moudud Ahmed vs. State, 68 DLR (AD) 118: The foregoing observations of this Division are not relevant in the instant case, because the respondent No. 1 did not raise any objection as to the issuance of notice/order under section 26 (1) of the ACC Act while he was in custody. Rather he complied with the same by submitting the statement of assets and liabilities within the stipulated time. Moreover, he was allowed to submit long after the stipulated date a supplementary sta tement of assets and l abilities which was marked as an exhibit during the course of trial. This issue was not raised, deliberated upon and decided before the trial court and the H gh Court Division in as much as no such issue was raised and deliberated upon before the Appellate Division and that this observation being an obiter dictum cannot operate as a binding precedent, which is not a law declared by the Appellate Division pursuant to Article 111 of the Constitution and, as such, it is not binding on the High Court Division and all other courts and tribunals as a legal precedent. (Para...62)

15. Moudud Ahmed vs. State, 68 DLR (AD) 118: In the instant case reported in 62 DLR (AD) 290 the vires of the law, section 18(2), was not challenged before a competent court of law and no issue in respect of vires of the law was raised, deliberated upon and decided by the competent court. Therefore, in a hearing of a Criminal Petition for Leave to Appeal a provision of law cannot be struck down or repealed by indirect means or by implication. (Para...59)

16. Moudud Ahmed vs. State, 68 DLR (AD) 118: What is binding on a Court is the ratio decidendi not the obiter dictum nor the judgment given per incuriam. (Para...71)

17. Moudud Ahmed vs. State, 68 DLR (AD) 118: This Division having power of review under Article 105 is not bound by a decision earlier taken by this Division. The power of review under Art. 105 is an extra-ordinary power which has to be exercised sparingly in the interest of justice. (Para...73)

18. Moudud Ahmed vs. State, 68 DLR (AD) 118: There was no further need to pass an Act in terms of the

amending Ordinance under Article 93(2) of the Constitution. It cannot be held that the amended provision of the Act ceased to have effect for non-compliance of the requirement of Article 93(2) of the Constitution inasmuch as the amending Ordinance was fully acted upon and served its objective prior to the Parl ament coming into session. (Para...75)

19. Moudud Ahmed vs. State, 68 DLR (AD) 118: Failure of the Parliament to pass an Act in terms of the amending Ordinance No. VII of 2007 do not destroy/repeal amendments which have already been incorporated in the ACC Act, 2004. (Para...77)

20. Bangladesh vs. SM Raiz Uddin Ahmed, 68 DLR (AD) 154: It is not permissible to take disciplinary action aga nst a person solely on the basis of adverse remarks made by a Tribunal in a criminal case unless the allegations imputed in the adverse remarks are proved in disciplinary proceeding. (Para...14)

21. Abdul Sattar Miah vs. Raman Sona Dashya & others, 68 DLR (AD) 157: A Hindu widow or a Hindu woman having life interest can very much maintain a suit for partition for the fullest enjoyment of her such right in the joint properties. (Para...13)

22. State vs. Swadesh Roy, "Daily Janakantha" & another, 68 DLR (AD) 162: The Appellate Division being the highest Court of the country is a court of record under Article 108 of the Constitution with wide power of judicial supervision over all the courts in the country. ...The inherent powers of the apex court of record remained unaffected even when the Constitution came into force, rather that power had been recognized by incorporating Article 108. The expression used in Article 108 is extensive in nature. .. This Court has power to punish the contempt of itself and also something else, which could fall within the inherent jurisdiction of the court of record. (Para...70 & 71)

23. Anti-Corruption Commission vs. Md. Shahidul Islam & others, 68 DLR (AD) 242: A Member of Parliament is, therefore, in the highest sense, a servant of the State; his duties those appertaining to the position he fills, a position of no transient or temporary existence, a position forming a recognized place in the constitutional machinery of government. ...A person authoritatively appointed or elected to exercise some function pertaining to public life. (Para...29)

24. Idrisur Rahman vs. Syed Shahidur Rahman & others, 68 DLR (AD) 258: The High Court Division cannot sit over the judgment of the Council. It has totally ignored that aspect of the matter and opined that the President did not apply his judicial mind in passing the order of removal After the recommendation of the Supreme Judicial Council the President is left with no discretion other than to accord the recommendation. (Para...94)

25. Idrisur Rahman vs. Syed Shahidur Rahman & others, 68 DLR (AD) 258: There is no Rules providing the procedure to be followed for removal of a Judge of the highest Court, The Supreme Judicial Council enjoins the power as per provision of clause (4) of Article 96 to prescribe the 'Code of Conduct' of the Judges. Similarly for the purpose of inquiry also, there is no Rules or Regulations framed by the government. It is left with the d scretion of the Council to follow the procedure. The Council on fol owing conduct rules and after affording Mr. Syed Shahidur Rahman sufficient opportunity to explain his conduct and upon hearing the parties held that Mr. Syed Shahidur Rahman should not remain in the judiciary because of his conduct. This opinion having been made by the highest body authorized by the Constitution and the President having taken the decision relying upon the recommendation of the Council, the judicial review is not permissible against such decision. ...This conclusion of the Council is sufficient on the part of the President to form his opinion that the Judge should not continue as a Judge of the High Court Division. (Para... 91 & 83)

26. Anti-Corruption Commission vs. Rezaul Kabir & another, 68 DLR (AD) 291: A proceeding cannot be quashed depending on alleged procedural error in the method of collection of evidence to be adduced and used. (Para...12)

27. Eusof Babu & others vs. State & another, 68 DLR (AD) 298: The difference between sections 138 & 140 is that in respect of section 138 the offence is committed by human being that is to say, natural person

and in section 140 though the expression "the person" is used which is qualified by a company which means "any body corporate and includes a firm of other association of individuals" which is a juristic person or not. It can be prosecuted for the offence under section 138. (Para...8)

28. Eusof Babu & others vs. State & another, 68 DLR (AD) 298: The dishonour of a cheque does not itself constitute an offence under section 138. If the drawer of such cheque fails to make payment of the amount of money to the payee within thirty days of receipt of the notice, the cause of action for constituting the offence will arise, and if a complaint is filed within one month of the date on which the cause of action arises, the court shall take cognizance of the offence. So, the cause of action will arise if the drawer fails to make payment to the payee. Now, if the same drawer fails to make payment of the amount of money covered by the cheque (s) within the stipulated time, does it constitute the cause of action? It does. If it does constitute the cause of action, there will be no legal bar to file a case for prosecuting the drawer for the cause of action. Here the cause of action is not distinct but the same. (Para...18)

At the behest of the Honorable Chief Justice of Bangladesh some books were donated by the Supreme Court to the Kashimpur Central Jail to promote reading habit of its prisoners.

Leading Decisions of the Supreme Court of Bangladesh in the year 2017

In view of Article 111 of the Constitution of People's Republic of Bangladesh, the law declared by the Appellate Division of the Supreme Court of Bangladesh is binding on all courts within the territory of Bangladesh including the High Court Division of the Supreme Court. Every judgment delivered by the Appellate Division has its own significance. Brief note of some judgments, delivered or reported during the year 2017, is given below:

1. Assistant Commissioner of Taxes, Salaries and another vs. BM Baker Hossain and others, 69 DLR (AD) 6 [Income Tax Ordinance (XXXVI of 1984); Section 92]: Legal representatives shall be liable to pay tax or other sum payable under Ordinance but the liabilities of the legal representatives under this Ordinance shall be limited to the extent to which the estate of the deceased is capable of meeting the liability...

2. Assistant Commissioner of Taxes, Salaries and another vs. BM Baker Hossain and others, 69 DLR (AD) 6 [Income Tax Ordinance (XXXVI of 1984); Section 165 and 166]: Launching of criminal case against any person under sections 165 and 166 of the Ordinance is a separate and independent proceeding of the ones provided for assessment and realization of penalty...

3. Chief Engineer (Project), Rural Electrification Board and another vs. Biswajit Ganguly and others, 69 DLR (AD) 10 [Constitution of Bangladesh, Article 40]: Right to profession-Right to profession/business/livelihood though is a classified right, but suspending/debarring the respondent from participating in REB's all bids without assigning any reason and non-renewal of his enlistment licence appears to be arbitrary and the right of the petitioner to participate as an enlisted contractor of REB having been taken away without assigning any reason is also without lawful authority...

4. Bangladesh Vs. Md. Ataur Rahman & ors., 9 SCOB [2017] AD 1 [Article 102 of the Constitution; Warrant of Precedence]: The High Court Division having considered the respective status and positions of different constitutional functionaries and the persons in service of the Republic rightly held that though impugned Warrant of Precedence is a policy decision of the Government, yet in the absence of evidence of any discernible guidelines, objective standards, criteria or yardsticks upon which the impugned Warrant of Precedence is ought to be predicated, we feel constrained to hold that the said Warrant of Precedence cannot shrug off the disqualification of being arbitrary, irrational, whimsical and capricious and is, therefore, subject to judicial review under Article 102 of the Constitution...

5. Bangladesh Vs. Md. Ataur Rahman & ors., 9 SCOB [2017] AD 1 [Article 102 of the Constitution; Warrant of Precedence]: Ends of justice would be best served if the District Judges and equivalent judicial officers are placed in the same table of the Warrant of Precedence along with the Secretaries and equivalent public servants. There is no denying that members of the judicial service (i.e., the subordinate judiciary) are not holders of the constitutional posts but they being public servants are in the service of the Republic and the nature of their service is totally different from the civil administrative executives. District Judges and holders of the equivalent judicial posts are the highest posts in the subordinate judiciary. In view of the provisions of the Article 116A of the Constitution all persons employed in the judicial service and all magistrates exercising judicial functions shall be independent in the exercise of their judicial functions, so it is immaterial to say that members of judicial service or the subordinate judiciary are above the senior administrative and defence executives...

6. Bangladesh Vs. Md. Ataur Rahman & ors., 9 SCOB [2017] AD 1 [Article 102 of the Constitution; Warrant of Precedence]: When there is a deviation from the constitutional arrangements or constitutional arrangements have been interfered with or altered by the Government or when the Government fails to implement the provisions of Chapter II of Part VI of the Constitution and instead follow a different course not sanctioned by the Constitution, the High Court Division as well as the Appellate Division is competent enough to give necessary directions to follow the mandate of the Constitution. This means the apex Court of the country is competent to issue directions upon the authorities concerned to perform their obligatory duties whenever there is a failure on their part to discharge their duties...

7. Bangladesh Vs. Md. Ataur Rahman & ors., 9 SCOB [2017] AD 1 [Article 102 of the Constitution; Warrant of Precedence]: The Warrant of Precedence of the neighbouring countries include the holders of highest civil awards, however the impugned Warrant of Precedence of our country does not include such dignitaries, who are not constitutional or public functionaries. As such, it is expected that those dignitaries who have been honoured or decorated with civil awards, e.i , Shadhinata Padak, or Ekhushey Padak, and those valiant freedom fighters who have been honoured with gallantry awards of Bir Uttam should be included in the Table of the impugned Warrant of Precedence in such order as deemed appropriate...

8. Mohammad Zafar Iqbal and others Vs. Bangladesh and others, 9 SCOB [2017] AD 25 [Acquisition and Requisition of Immovable Property Ordinance, 1982 Section 3]: The law gives the Deputy Commissioner to acquire any property if he is satisfied that the property is needed for public purpose. In the not ce the Deputy Commissioner specifically mentioned the purpose for which the notice was served that it was for the public purpose of Baddyabhum . This order clearly spelt out the actual existence of requirement for a public purpose within the meaning of section 3 of the Acquisition and Requisition of Immovable Property Ordinance, 1982. .f the reason for the issuance of the notice of acquisition was not one contemplated by law, the initiation of the proceedings would be void. It is the Deputy Commissioner who is primarily the judge of the facts which would attract section 3 of the ordinance. This opinion cannot be replaced by any other authority...

9. Mohammad Zafar Iqbal and others Vs. Bangladesh and others, 9 SCOB [2017] AD 25: A mausoleum for the memory of martyrs of the war of liberation is normally constructed on the site where the martyrs were killed and buried. This site cannot be shifted to another site. It is because a monument is built on the killing spot with a view to remember the memories of martyrs who sacrificed their lives for the independence of the country. The preservation of the memory of the martyrs and the national heros is necessary because this would remind our next generation the cruel assassination and mass killing by the Pakistani occupation army with their accomplices and also to show the outsiders that this is the evidence of our history of liberation war. If this memory is erased from the memory of our next generation, the very cause for which martyrs had sacrificed their lives would be fruitless...

10. The Government of Bangladesh, represented by Chairman Abandoned Property Management Board vs. Md. Mizanur Rahman, 9 SCOB [2017] AD 37 [The Code of Civil Procedure, 1908; Rules: 1 and 2 of Order XVIII]: In the instant case, the defendant did not admit the case of the plaintiff and fi ed written statement denying the plaintiff's claim that the suit property was an abandoned property, so it was the plaintiff who had the right to begin the hearing of the suit as per provision of rule 1 of order XVIII of the Code. Rule 2(1) of the Code has clearly provided that on the day fixed for hearing of the suit the party having the right to begin shall state his case and produce evidence in support of the issues which he is bound to prove, the other party shall then state his cause and produce his evidence (if any) and may then address the Court generally on the whole case. Therefore, there was no scope on the part of the plaintiff to avoid examination of witness and state the facts of the plaint at the hearing of the suit...

11. Most. Rabeya Khatoon being dead her heirs: Md. Abdur Rakib Sarker and others vs. Jahanara alias Shefali Bewa being dead her heirs: Salma Akter alias Most. Maya Khatun and others, 9 SCOB [2017] AD 40 [Mohamedan Law of Bequest]: Bequest by a Mohamedan to his heir of any quantum of property requires the consent of his other heirs after his death to be valid. But a bequest by a Mohamedan to any stranger (other than his heir) upto one-third of the surplus of his property which remains after payment of his funeral expenses and debts is valid and does not require consent of the heirs of the testator. Bequest to a stranger over and above one-third of the property of the testator which remains after payment of funeral expenses and debts of the testator requires the consent of the heirs of the testator after his death to be valid...

12. Bangladesh & ors Vs. Professor Nurul Islam & anr, 9 SCOB [2017] AD 46: Right to life is not only limited to protection of life and limbs but also extends to the protection of health, enjoyment of pollution free water and air, bare necessaries of life, facilities for education, maternity benefit, maintenance and improvement of public health by creating and sustaining conditions congenial to good health and ensuring quality of life consistent to human dignity...

13. Bangladesh & ors Vs. Professor Nurul Islam & anr, 9 SCOB [2017] AD 46 [Constitution of Bangladesh; Articles 18(1), 31 and 32]: No one has any right to endanger the life of the people which includes their health and normal longevity of an ordinary healthy person. Articles 31 and 32 of the Constitution not only means protection of life and limbs necessary for full enjoyment of life but also includes amongst others protection of health and normal longevity of an ordinary human being. It is the obligation of the State to discourage smoking and consumption of tobacco materials and the improvement of public health by preventing advertisement of tobacco made products. Though the obligation under Article 18(1) of the Constitution cannot be enforced, State is bound to protect the health and longevity of the people living in the country as right to life guaranteed under Articles 31 and 32 of the Constitution includes protection of health and longevity of a man free from threats of man-made hazards. Right to life under the aforesaid Articles of the Constitution being fundamental right it can be enforced by this Court to remove any unjustified threat to health and longevity of the people as the same are included in the right to life...

14. Bangladesh & ors Vs. Professor Nurul Islam & anr, 9 SCOB [2017] AD 46: When the right to life of the people is at stake, the legislature is under the obligation to enact law to protect such right as per directives of the Court. As such the question of encroaching upon the domain of the legislature by the Court does not arise...

15. Non-Government Teacher's Registration and Certification Authority (NTRCA) and another vs. Lutfor Rahman & ors, 9 SCOB [2017] AD 62: It is patent from the records that all the respondents went through the rigorous process of selection and were appointed in their respective post. They were served with notices cancelling their appointment without issuing any show cause notice. The respondents joined their posts and served accordingly for more than nine months at the time of filing their writ petition. We are of the view that without issuing any show cause notice the petitioners could not lawfully cancel the letter of appointment of the respondents...

16. Biman Bangladesh Airlines And others vs. Al Rojoni Enterprise, 9 SCOB [2017] AD 66[Carriage by Air (International Convention) Act, 1966; Rule 29 of the first schedule Read with section 29 of the Limitation Act]: The High Court Division committed an error of law in holding that the date on which carriage stopped was the date on which the carrier defendants admitted its failure to deliver its goods finally and offered payment of compensation in lieu of the goods. The time for limitat on began to run from the exp ry of 7 days after the date on which the goods ought to have arrived, that is, on 22 01.1999. Since the suit was filed on 24.05 2001 apparently the same was barred by limitation in view of special limitation provided in Rule 29 of the first schedule of the Carriage by Air (International Convention) Act, 1966 read with section 29 of the Limitation Act...

17. President, Bangladesh Garments Manufacturers and Exporters Association (BGMEA) vs. Bangladesh and others, 9 SCOB [2017] AD 70 [Joladhar Ain 2000 (Act XXXVI of 2000), Sections 5 and 8]: The BGMEA has constructed a fifteen storied commercial complex on the "Begun Bari Khal" and "Hatir Jheel Lake" which are natural waterbodies (প্রাকৃতিক জলাধার) as has been specifically admitted in the schedule to the transfer deed, Annexure-K-2 as well as in the government record and in the Master Plan of the Dhaka City, as Lake/Jolashoy/Doba. As such from the above provision of law, the class or the nature and character of the same cannot be changed nor can be used in any other manner/purpose nor can the same be leased out, rented or transferred by anybody. The law further provides that any person changing the nature and character of such "Joladhar" (waterbody), in violation of section 5 of the said Act of 2000, shall be dealt with in accordance with law as provided in section 8. Since BGMEA has constructed the multi-storied commercial building upon the said waterbody in violation of the law such illegal construction/obstruction must be demolished for which the BGMEA or any other person, notwithstanding anything conta ned in any other aw, cannot claim any compensation as provided in Section 8(2) of the Joladhar Ain 2000...

18. President, Bangladesh Garments Manufacturers and Exporters Association (BGMEA) vs. Bangladesh and others, 9 SCOB [2017] AD 70: We perused the Dhaka Metropolitan Development Plan, VOL-II Urban Area Plan (1995-2015) published in the Gazette notification vide SRO No. 91-AIN/1997 on 05.04.1997, commonly known as "Proposed Master Plan", wherein the "Begunbari Khal" has been recorded and

recognized as a "Joladhar". Side by side the registered deed in favour of EPB executed by the Bangladesh Railway Annexure K-2, in its schedule clearly mentioned the transferred property as "Doba"-(waterbody) which attracts Section 2(Cha) of the "Joladhar Ain 2000" as well as section 2(ka ka) of the Environment Conservation Act. As such pursuant to the non-obstante clause incorporated in section 3 of the "Joladhar Ain 2000" as well as section 2Ka of the Environment Conservation Act 1995, both the laws shall prevail over any other law prevailing in the country for the time being in force. Thus the prohibition imposed by section 5 of the Joladhar Ain and section 6 (Uma) of the Environment Conservation Act shall automatically come into operation and any violation of the said prohibition shall be dealt with in accordance with section 8 of the "Joladhar Ain," as well as section 15 of the Environment Conservation Act 1995. In such view of the matter the transfer/allotment of the water body by EPB to BGMEA and consequently the change of the nature and character of the said water body ("Joladhar") by BGMEA is completely violative of the said two laws and as such the violators are liable to be punished with imprisonment and fine and such illegal construction is liable to be demolished for which BGMEA or any other person is not liable to get any compensation ..

19. Sharif vs State, 69 DLR (AD) 41: In an application under section 561A of the Code, there is little scope to scan the evidence of witnesses and that since it is not a case of no evidence it is difficult to interfere with the judgment passed by the Tribunal...

20. Abdul Motaleb vs Md Kamal Uddin and others, 69 DLR (AD) 42[Muslim Marriages and Divorce (Registration) Act CLII of 1974); Section 4]: When a Kazi is appointed, his service will continue as Kazi until and unless he is in any way disqualified under the law. Upon conversion of the Union Parishad to a Pourasava only the character of the Administrative unit changes. It is our view that Kazi, who was operating as such within the Union Parishad continued as Kazi for the whole area of that Union Parishad, which then became the Pourasava, i.e.. he continued as Kazi for all Wards of the newly created Pourasava until his jurisdiction was lawfully curtailed in respect of some Wards. The law permits the Government to curtail the jurisdiction of Kazis...

21. Chairman, District Council, Feni, Deputy Commissioner, Feni and another vs. Feni Alia Madrasha Mosque Committee and others, 69 DLR (AD) 46 [Local Government Ordinance (XC of 1976) Section 91]: Maintainability of suit for non-service of notice-where there are mandatory provisions of law to be complied with before filing a suit, such provisions must be complied with before institution of the suit. Since the provision of section 91 of the Ord nance was not complied with the suit was not maintainable..

22. Government of Bangladesh, represented by the Secretary, Ministry of Communication Dhaka and others vs. Zafar Brothers Limited and another, 69 DLR (AD) 52[Constitution of Bangladesh; Article 102]: While exercising the writ jurisdiction under Article 102, the High Court Division is a Court of law and not a Court of equity and it also cannot pass any order for ends of justice. The High Court Division must act in terms of the letters of Article 102 and not beyond that taking into consideration what would be good or bad under the principle of equity...

23. Government of Bangladesh, represented by the Secretary, Ministry of Communication Dhaka and others vs. Zafar Brothers Limited and another, 69 DLR (AD) 52[Constitution of Bangladesh; Article 102]: A Court of equity is authorized to apply the principle of equity as opposed to law to the cases brought before it. A Court of law must follow the black letters of the statute while a Court of equity has the ability to do what is fair and equal...

24. Md. Sharifullah and another vs. Md Tafazzal Hossain and another, 69 DLR (AD) 61[Code of Civil Procedure (V of 1908); Order XVIII, rule 17 and Evidence Act (I of 1872); Sections 137 and 138]: A witness is not entitled to correct his deposition after putting his signature in the deposition sheet and if such a recourse is allowed to be practised by a witness, then the whole purpose of cross examination shall be frustrated and in the process the cross examination shall become a mockery

25. Bangladesh and others vs BLAST and others, 69 DLR (AD) 63: In clause 'Firstly' of section 54 the words 'credible information' and 'reasonable suspicion' have been used relying upon which an arrest can be made by a police officer. These two expressions are so vague that there is chance for misuse of the power by a police officer, and a police officer while exercising such power, his satisfaction must be based upon definite facts and materials placed before him and basing upon which the officer must consider for himself before he takes any act on. It will not be enough for him to arrest a person that there is likelihood of cognizable offence being committed...

26. Bangladesh and others vs BLAST and others, 69 DLR (AD) 63: Since a remand order is a judicial order, the Magistrate has to exercise this power in accordance with the well settled norms of making a judicial order. The norms are that he is to see as to whether there is report of cognizable offence and whether there are al egations constituting the offence which is cognizable Non-disclosure of the grounds of satisfaction by a police officer should not be accepted. Whenever, a person is arrested by a police during investigation he is requ red to ascertain his complicity in respect of a cognizable offence..

Supreme Court Judges' Sports Complex being inaugurated by Honorable Mr. Justice Md. Abdul Wahhab Miah, Performing the Functions of the Chief Justice of Bangladesh. Honorable Former Chief Justice Mr. Md. Muzammel Hossain was also present in the occasion

Leading Decisions of the Appellate Division of the Supreme Court of Bangladesh in 2018

1. **Alhaj Dr. Chowdhury Mosaddequl Isdani vs. Abdullah Al Munsur Chowdhury & ors, 10 SCOB[1] [2018] AD[2] 19 [Persona Designata]:** In legal parlance the expression "persona designa" means a person who has been described in a statute or a legal instrument by his official designation, and his function may be judicial or may not be so. But if the function of the designated person is judicial in character then he is nothing but a "court" even though he is not described as a court but by official designation. The test is the power and function he has to discharge.

   The jurisdiction under section 115 of the Code is very limited. It has not empowered the revisional court to sit on appeal and take into consideration new facts placed before it through affidavit. It has the power to interfere with the judgment only when there appears error of law apparent on the face of the record occasioning failure of justice.

2. **Bangladesh Rubber Industries & another vs. Dine Ara Begum & others, 10 SCOB [2018] AD 1 [Dissolution of partnership]:** Having considered the cases cited above, we find that a deed of dissolution of partnership is not required to be registered under section 17 of the Registration Act because the share of a partner in a partnership is essentially moveable property notw thstanding that a part of the partnership property may be immovable.

3. **Kamal alias Exol Kamal vs. State, 10 SCOB [2018] AD 12 [Commutation of Sentence]:** On the question of commutation of the sentence, we are to take into consideration the heinousness of the offence committed in juxtaposition with the mitigating circumstances. It is by now established that in Bangladesh the sentence for the offence of murder is death which may be reduced to one of imprisonment of life upon giving reasons. It has been the practice of this Court to commute the sentence of death to one of imprisonment for life where certain specific circumstances exist, such as the age of the accused, the criminal history of the accused, the likelihood of the offence being repeated and the length of period spent in the death cell

4. **Md. Hafizuddin vs. Mozaffor Mridha & ors, 10 SCOB [2018] AD 6 [Basic Principles of Waqf]:** Three basic pr nciples governed the waqf: the trust was required to be irrevocable, perpetual, and inalienable. Once property was declared waqf by its owner, the trust thereby created was irrevocable. It means (i) inalienable lands used for charitable purposes and (ii) pious endowments.

5. **Haji Shamsul Alam vs. Dr. Ashim Sarker & others 11 SCOB [2019] AD 7 [Section 4 of the Partition Act, 1893, basic pre-requisites for buy up]:** It is observed that to get an order of pre-emption under section 4 of the Partition Act three condition are to be fulfil ed, i.e. (1) the property must be dwelling house, (2) it must be the undivided family and then (3) the purchasers must file the partition suit. That is one of the basic conditions for applicability of section 4 of the Partition Act which has been expressly mentioned in the section is that the stranger transferee must sue for partition and separate possession of the undivided share transferred to him by the co-sharer. If the stranger moves execution application for separating his share by metes and bounds it would be treated to be application for suing for partition and it is not necessary that separate suit should be filed by such stranger transferee. In this case the defendant No. 5 appellant Shamsul Alam is the transferee of the land under partition and the suit has been filed by Dr. Ash m Sarker who is not the transferee and appellant did not pray for any saham as yet in the said suit for partition, so the prayer for buying up by the paintiff was not at all maintainable at the stage of the suit when the same was prayed for. The courts below have committed error of law in allow.ng the prayer for buy ng up.

6. **The Election Commission Bangladesh and another vs. Noruzzaman Sarker and others, 11 SCOB [2019] AD 1 [Election Disputes– Appropriate Forum]:** Where the total number of votes cast in a centre exceeds either the total number of ballot papers issued to the centre or the total number of votes enrolled for that centre, or if during the counting of ballot papers a ballot box is found

[1]SCOB = Supreme Court Online Bulletin
[2]AD = Appellate Div sion

missing or it is snatched away or if the Presiding Officer makes glaringly contradictory reports as to the result of the counting of votes, without reasonable explanation, then the Election Commission need not wait for determination of the dispute by the Election Tribunal. But where no such thing has happened but allegation is brought after the declaration of the result then it is always desirable that dispute, if any, should go to the Tribunal for determination

7. **Ashuganj Fertilizer and Chemical Company Limited, represented by its Managing Director and others vs Md. Abu Sufian Bhuiyan and others, 12 SCOB [2019] AD 1 [Dismissal from service, termination simpliciter]:** The orders of termination were not termination simpliciter. Consequently, this is the outcome of arbitrary exercise of power in a malafide way and as such, the High Court Division was justified in making the Rule absolute declaring the orders of termination to have been passed without lawful authority and to be of no legal effect.

   There was an inquiry about the appointment of the writ-petitioner and pursuant to the said inquiry, the writ-petitioner were terminated from service. Therefore, it cannot be said that the writ-petitioner were terminated from service and in fact, they were dismissed from service in the garb of termination.

8. **Mir Showkat Ali and others vs Md. Morsalin Khan and others, 12 SCOB [2019] AD 8 [Authority of the Executive Committee of the Orphanage to deal with property]:** The Management/Executive Committee of the Orphanage had no authority to deal with the land other than for the purpose stipulated in the indentures. Those persons at the helm of the affairs of the Orphanage could not arrogate to themselves the authority to transfer the title in the property, which they themselves did not have. The Orphanage was given the property on a short term lease, which was apparent from the lease deeds. As long as these lease deeds existed and as long as the terms were not altered by the executants of the deeds none had the authority to deal with the land other than the purpose for which the lease was granted.

9. **Bangladesh Agricultural Development Corporation, represented by its Chairman, Dhaka and others vs Md. Shohidul Islam and others, 12 SCOB [2019] AD 23 [voluntary retirement of service]:** After 10 years of their voluntary retirement and after receiving full financial benefits as offered the prayers for reinstatement cannot be termed as reasonable and fair. After having applied for voluntary retirement of service and taken the money it is not open to contend that they exercised the option under any kind of coercion and undue influence. Who had accepted the ex gratia payment or any other benefit under the scheme, could not have resiled therefrom. It became past and closed transaction. The writ petitioners having accepted the benefit could not be permitted to approbate and reprobate nor they be permitted to resile from their earlier stand.

10. **Rashed vs The State, 12 SCOB [2019] AD 34 [Dying declaration, section 32(1) of the Evidence Act 1872]:** Dying declaration cannot be considered as the sole basis for conviction and awarding sentence to the appellant, specifically in the absence of any of the witnesses who were present in the hospital during the time when the alleged dying declaration was made by such a critically injured person who was under intensive care and not supposed to be in conscious. As such the finding of the High Court Division that 'the prosecution has clearly established the motive of the case and the oral dying declaration has also been supported by the medical evidence and other circumstances and materials on record' is not sustainable in law.

11. **Abul Hasem (Md) vs Bangladesh, 70 DLR[3] (AD) 13 [Section 12(3)(C) of the Antiquities Act 1968]:** Law requires that to maintain its beautification, the owner of the surrounding buildings should not be allowed make any alteration without prior permission of the Director. The petitioner cannot make renovation of the disputed building even if it is assumed that it is located outside the Lalbagh Fort without prior permission.

12. **Kazi Rafiqul Islam vs Kazi Zahirul Islam and others, 70 DLR (AD) 135 [Section 59, 79 and 114 of the Evidence Act, 1872]:** If the question is whether the deed is genuine or not, the simple answer is, it being a registered document is showered with a strong presumption as to genuineness. Section 59,79 and 114 of the Act lend support to section 60 of the Registration Act on this score.

[3]DLR= Dhaka Law Reports

No doubt, this presumption is rebuttable, which connotes that presumption raised by the admitted fact of registration could be rebutted by adducing counter vailing evidence, showing that notwithstanding the fact of registration, the executant did not really affix his signature or thumb impression voluntarily wh ch n the given circumstances, could be done by adducing expert evidence as to the physical and/or mental incapacity of the executant

13 **Parvin Akter and others vs. Eastern Bank ltd and others, 70 DLR (AD) 117 [Artha Rin Adalat Ain (VII of 2003), Section 7(1)]:** Where substituted service was done by publication in the newspaper, the presumption of the service cannot be rebutted by making simple statement.

Section 6(5) of the Ain and Order I, rule 10 of the Code have got no relevancy in connection w th a disposed of suit. It is true that no Court can be regarded as powerless to recall an order in an under tria case pending before it if it is convinced that the order is wangled through fraud or misrepresentation but pre-condition is that such proceeding must be pending before it The court must have jurisdiction over the proceeding before it can exercise any inherent power. The Adalat was not justified in resorting its power under section 57 of the Ain to reopen the decree after dispose of the suit

14 **Bangladesh vs Dr. Monija Begum and another, 71 DLR (AD) 44 [Constitution of Bangladesh, 1972, Article 135(2)]:** Decision of the concerned authority to treat the service of the writ-petitioner as ceased, without considering any special circumstances put forward by her, is in violation of rule 34 of the BSR.

When absence from work exceeds five years, be the absence with or without leave, the service of a Government servant wil come to an end. However, the Government may make a different decision upon taking into consideration any special circumstances. This automatic ceasing of the service is subject to the ability of the Government to take a different decision in the light of special circumstances

15 **Bene Maritime Inc. vs Aman Feed Ltd and others, 71 DLR (AD) 50 [Admiralty Court Act, Sections 3 and 4]:** ,urisdiction of Admiralty Court—The question of declaration of General Average Bond and signing of General Average Guarantee by the plaintiff is out of ambit of the jurisdiction of this Court (the Admiralty Bench of the High Court Division) and falls under the purview of arbitration.

16. **Moudud Ahmed vs State, 71 DLR (AD) 25 [Evidence Act, section 114]:** Any orders recorded by a Court in the order sheet reflect the acts done, actions taken and matters which arose during the course of any proceed ng. The notings bear a special sanctity as provided by section 114 of the Act. They are official record and cannot be brushed aside lightly.

17. **State vs Begum Khaleda Zia, 71 DLR (AD) 14 [Code of Criminal Procedure, Section 498]:** Ends of Justice would be best served if the High Court Divison is directed to adjudicate upon the issue of maintainability while disposing of the Rule issued in respect of the bail of the accused

18. **Marium Dawood vs Iqbaluddin Chowdhury 23 BLC[4] (AD) 14 [Contract Act 1872, Section 182 and 209]:** Where an agency is terminated either by the death of the principal, or by his becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal all reasonable steps for the protection and preservation of the interest entrusted to him. This section does not purport to confer any power on the agent. It simply imposes an obligation on the agent to take all reasonable steps in the interest the representatives of the principal.

19. **Mirpur ceramic works limited and another vs Yousuf Ariff Tabani and others 23 BLC (AD) 70 [Companies Act 1994, Section 81(2) and 85(3)]:** If there be any grievance of any share-holder/director in respect of any resolution or any action taken and approved in earl er meeting contrary to law or against the interest of the company then the same can be taken care of by discussions in extra-ordinary general meeting and if necessary take steps accordingly. But under no circumstances a director/share-holder being aggrieved by a resolution taken in his presence can invoke sections 81(2) and 85(3) of the Act, which deals with only condonation of holding Annual General Meeting or when the holding of such meeting becomes impractible.

[4]BLC = Bangladesh Law Chronicles

20 **State vs Md Zakir Hossain 23 BLC (AD) 150 [Code of Criminal Procedure, Section 164 & 364]:** Whether a confession is inclupatory or exculpatory depends on the statement of the accused in relation to his presence at the scene of the crime and his actions before, during and after the commission of the offence It can be seen from many of our dicisions that even standing guard while others commit the offence charged is sufficient to conclude that the confession is inculpatory. Only if it can be seen from his actions that the confessing accused was at the scene reluctantly or under duress, and he distanced or dissociated himself from the occurrence by, for example, running away from the scene, then the confess on may be termed exculpatory

21 **Bangladesh Railway, Dhaka & Ors vs Most. Monowara Begum & Ors, 26 BLT[5] [2018] AD 63[section 103B(5) of Bengal Tenancy Act 1885, writ of mandamus]:** t appears from the materials on record that the disputed land was recorded in the name of Bangladesh Railway. It is the positive case of the Railway that the Government acquired the said land for Ra lway and handed over possession of the same to the Railway. Accordingly, C.S. record of right was prepared in the name of Railway. From the C.S. khatian produced by the appellant it appears that the case land was recorded in khatian No.16868 in the name of Eastern Bengol State Railway Division under Barat Samrat. C.S. khatian has got presumptive value. According to section 103B(5) of Bengal Tenancy Act every entry in a record of right finally published shall be evidence of the matter referred to in such entry shall be presumed to be correct until it is proved by evidence to incorrect. The same has got a probative value. We do not find anything in the record, relying on which, it can be said that such presumption has been rebutted. There are certain principles with regards to issuance of a writ of mandamus. It may be granted only where there is a statutory duty imposed upon the officials concerned and there is a statutory failure on their part to discharge that statutory obligation. In order to get such direction, the writ petitioner has to sat sfy that she has a legal right in the case land, the writ respondents have a legal obligation to hand over possess on of the same to the writ petitioner, such prayer has been made bonafide and that the writ respondents, in spite of her legal right in the case land, refused to perform their legal duty to hand over possession of the same. The object mandamus is to compel performance of a legal duty. It is the peremptory order of the High Court Division commanding to do which the Government or any local authority is under legal duty to do. A writ of mandamus is controlled by equitable principles. It can be granted to a person who comes to the court with clean hands and not guilty of fraud-The writ of mandamus cannot be demanded ex-debito justifiae but it issues only in the discretion of the court. It is a high prerogative writ and is to ampliate justice not to give effect of a decree which is apparently fraudulent and collusive in nature. It is a malafide attempt on behalf of writ petitioner Monowara Begum, wife of an Advocate to grab the property of the Republic. She came in this Court with unclean hands.

22 **Monjur Morshed Khan and others vs Durnity Daman Commission (Anti Corruption Commission) and another, 26 BLT [2018] AD 57[Further investigation] :** Since the order of discharge neither amounts to an acquittal nor to final order, the accused can be proceeded against for the same offence on the bas s of supplementary report submitted on holding further investigation or on the basis of naraji petition filed by the informant/complainant. It is no longer res integra that the Court, if exigent to do so, to espouse the cause of justice, can trigger further investigation even after a final report is submitted under section 173(3B) of the Code.

[5]BLT = Bangladesh Law Times

Leading Decisions of the Supreme Court of Bangladesh in the year of 2019.

1. **Government of Bangladesh, represented by the Secretary, Ministry of Social Welfare, Bangladesh Secretariat & others-Versus-Md. Akterun Nabi, 71 DLR[1](AD)2019, 319 [Article 102(2) of the Constitution of Bangladesh]**

   When any person renders service to anybody he has a right to get remuneration for the service he rendered and it is the duty of the party who received such service to pay for such service he received. The writ-petitioner had rendered service for 2 extra years and he should not be deprived of getting proper remuneration for the same. The duty cast upon the authority to see whether the writ-petitioner had been in service accordance with law or not.

2. **Government of Bangladesh -Versus. Abdul Mannan & ors. 13 SCOB[2] [2020] AD[3]. [Abandoned property, Suit for specific performance of contract]**

   In the suit for specific performance of contract the declaration of the suit property is not an abandoned property, is beyond the scope of the suit and such declaration has no legal value at all. In a suit for specific performance of contract the only issue to be decided whether the contract was genuine or not and as such, though the Government is made a party to a suit for specific performance of contract as a requirement of law it is not bound by the decree.

3. **The State -Versus.- Abdur Razzak & ors. 13 SCOB [2020] AD. [Absorption and doctrine of legitimate expectation]**

   The legitimate expectation would not override the statutory prov sion. The doctrine of legitimate expectation cannot be invoked for creation of posts to facilitate absorption in the offices of the regular cadres/non cadres. Creation of permanent posts is a matter for the employer and the same is based on policy decision.

   While transferring any development project and its manpower to revenue budget the provisions provided in the notifications, government orders and circulars quoted earlier must be followed. However, it is to be remembered that executive power can be exercised only to fill in the gaps and the same cannot and should not supplant the law, but only supplement the law.

   Before regularization of service of the officers and employees of the development project in the revenue budget the provisions of applicable "Bidhimala" must be complied with. Without exhausting the applicable provisions of the "Bidhimala" as quoted above no one is entitled to be regularised in the service of revenue budget since those are statutory provisions.

   The appointing authority, while regularising the officers and employees in the posts of revenue budget, must comply with the requirements of statutory rules in order to remove future complication. The officers and employees of the development project shall get age relaxation for participation in selection process in any post of revenue budget as per applicable Rules.

   A mandamus cannot be issued in government and its instrumentalities to make anyone regularized in the permanent posts as of right. Any appointment in the posts described in the schedule of Bangladesh Civil Service Recruitment Rules, 1981, Gazetted Officers (Department of Live Stock Service) Recruitment Rules, 1984 and Non-gazetted Employees (Department of Live Stock Service) Recruitment Rules, 1985 bypassing Public Service Commission should be treated as back door appointment and such appointment should be stopped.

   To become a member of the service in a substantive capacity, appointment by the President of the Republic shall be preceded by selection by a direct recruitment by the PSC. The Government has to make appointment according to recruitment Rules by open competitive examination through the PSC.

1 DLR = Dhaka Law Reports
2. SCOB = Supreme Court Online Bulletin
3 AD = Appellate Division

Opportunity shall be g ven to eligible persons by inviting applications through public notification and appointment shou d be made by regular recruitment through the prescribed agency following legally approved method consistent with the requirements of law.

It is not the role of the Courts to encourage or approve appointments made outside the constitutional scheme and statutory provisions. It is not proper for the Courts to direct absorption in permanent employment of those who have been recruited without following due process of selection as envisaged by the constitutional scheme.

4. **Executive Engineer Roads & Highway Department (RHD) Road Division, Munshiganj –Versus.- Md. Nurul Islam & others, 71 DLR (AD) 2019, 349 [Section 10(1) of Arbitration Act and Order VII, Rule 11 of The Code of Civil Procedure, 1908]**

Any objection regarding the proceeding in the civil Court that must be taken in the earliest opportunity before filling the written statement in the suit. There is no legal impediment or any cogent reason to hold that clause 25 of the agreement stands as a bar to file the suit for compensation.

In determining whether a plaint is to be rejected, the Court will take only the plaint and documents fi ed therewith into consideration and not what has been urged by the defendant in a petition or in the written statement.

5. **Government of Bangladesh & others –Versus.- Md.Nazrul Islam & others, 27 BLT[4] (AD) 2019, 167 [Article 102 of the Constitution of Bangladesh, 1972, Writ of mandamus]**

The case of the writ petitioners is that they are entitled to have M.P.O. as they have already completed all the formalities and criteria to have the same. They further claimed that although other teachers have the M.P.O. of the same college but their case in not considered by the concerned authority. They served the legal notice but in vain. Hence, they filed the writ petition for redress. Whether the writ petitioners have any legal right to have the M.P.O. as teachers of the said college and they are legally entitled invoke the jurisdiction of writ of mandamus for direction upon the writ respondents to include their names in the M.P.O. list of the college.

In the case in hand the petitioners did not allege that the writ respondents have violated any legal right of them. The granting of M.P.O. is the policy decision of the Government. Therefore, the petitioners could not claim the same as of right This Division is of the view that teachers and staffs of the Non-Government School and col ege could not claim the M.P.O. as a matter of right and as such, direction could not be given unless infringement of legal right or violation of law.

6. **Durnity Daman Commission –Versus.- Humaiyun Kabir (Md) & others, 24 BLC[5] (AD) 2019, 133 [Section 2(aa) and 4 of the Administrative Tribunal Act, 1980]**

On careful scrutiny of the Schedule to the Act, it transpires that anti-corruption commission is not included in it. It cannot be said that the writ petition was not maintainable as the Act was not applicable to the writ petitioner Since the Act was/is not applicable to the writ petitioner and he had no other equally efficacious remedy available in any other forum, provided by any law the High Court Division rightly found the writ petition to be maintainable.

7. **Mst. Selina Gulshan Ara Gul Hasna –Versus.- Mashiur Rahman being dead his legal heirs: 1(Ka) Mst. Asmaul Husna & others 27 BLT (AD) 2019, 68 [Section 244 of the State Acquisition and Tenancy Act, 1950]**

Whether the pre-emptor was a co-sharer or not due to the jama of the co-sharer have been separated upon publication of the newly created record of Khatian in the name of the seller. The High Court Division upon discussing all the facts and circumstances of the case came to a conclusion that the mutation of any person's name in the holding is nothing but only for payment of rent and the co-sharer-ship cannot be ceased by mere mutation and accordingly the High court Division found that both the Courts below failed to consider that mere mutation in fact ceased any one to be a co-sharer and as such both the courts below arrived at an erroneous finding in holding

4 BLT = Bangladesh Law Times
5 BLC = Banglades Law Chronicles

that due to mutation the right of pre-emption of the pre-emptor has been lost and consequently the pre-emptor lost co-sharer-ship in the holding. In section 24 of the Non Agricultural Tenancy Act it is provided that if a co-sharer tenant owns a portion of land in any plot, he is to be treated as co-sharer in the entire plot even if the land of that plot is recorded in more than one Khatian. Thus in spite of the fact that the khatian separated by mutation the pre-emptor is still a co-sharer in the case plot. This vital aspect has not at all been considered by the court below and thereby both the courts below erred in law in disallowing pre-emption. The High court Division having rightly considered this aspect of law made the Rule absolute and set aside the judgments of both the courts below.

Law in respect of pre-emptor is, no matter whether any co-sharer was offered to purchase the property and/or he refused to do the same earlier that will, under no circumstances, create an estoppel/waiver. Because the right of the pre-emptor accured on and from the date of registering the deed under section 60 of the Registration Act or from the date of knowledge of such transfer till 4(four) months thereafter. In the present case the deed was admittedly executed on 4.11 2007 and was endorsed in the volume under section 60 of the Act in 2011 and the pre-emptor having come to know about the transfer on 20.01.2011 the pre-emptor case has been filled on 04.02 2011 which is very much within the period of limitation So the submission of the learned Advocate for the petitioner that the pre-emptor case is barred by waiver, estoppel, and acquiescence has no ground to stand.

8. State –Versus.- professor Dr Morshed Hasan Khan & 16 anothers 71 DLR (AD) 2019, 364 [Article 32 of the Constitution of Bangladesh and Section 498 of the Code of Criminal procedure, 1898]

It is to be borne in mind that the protection of personal liberty stands expanded to make the right to life or personal liberty save in accordance with law under Article 32 of the Constitution. The language of this article itself recording to an exception indicating thereby that a person may be deprived of his liberty in accordance with the procedure established by law. It is also to be remembered always that personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the facts and circumstances of the case It is expected that every arrest must be in accordance with the procedure established by law.

Anticipatory bail- No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. No attempt should be made to provide right and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualised for the grant or refusal of anticipatory bail.

9. Md. Murtuza Shah & another –Versus.- Ataharul Haque & others 27 BLT (AD) 2019, 185 [Definition of Abandoned property and Jurisdiction under Article 102 of the Constitution]

If any person who left his property or is not present in Bangladesh or whose whereabouts are not known or who has ceased to occupy, supervise or manage in person his occupy, supervise of manage in person his property, during the period of liberation in 1971 was at war with or engaged in military operation against the Bangladesh, his property under the definition shall be included as an abandoned property.

Before issuing the rule the High court Division ought to have gone through the merit of the writ petition and if it is apparent from the statement of the writ petition that the petitioner neither aggrieved person nor have any locus standi to file the writ petition, such type of vexatious application should be rejected summarily.

10. Hosneara Begum -versus.- A.K.M. Bahauddin alias Bahar and others, XVI ADC[6] (AD) 2019, 165.

The courts should avoid the temptation to be become authoritarian. We have been coming across several instances, where in their anxiety to do justice, the courts have gone overboard, which results injustice, rather than justice. It is said that all power is trust and with greater power comes greater responsibility. Judicial restraint is a virtue. A virtue which shall be concomitant of every judicial disposition. In the context to dealing with strictures passed by the High Court Division

6. ADC = Appellate Division Cases

against a Lawyer, who is an officer of the Court as well, stressed the need to adopt utmost judicial restraint against using strong language and imputation of orupt motives against him/her because the Lawyer had no remedy and he/ she would act pursuant to the decision of his/her client. Making observations in the judgment or order, unless the person in respect of whom comments and criticisms are being made is party to the proceeding and is granted an opportunity of having his/her say in the matter, unmindful of the serious repercussion it may entail on such person is most uncalled for. Judicial domain requires dispassionate approach and the importance of issues involved for consideration is no justification to throw to winds basic judicial norms. Observation should not be made by the Court against any person unless it is essential for decision of the case.

11. **Khalishpur Jute Mills Ltd -versus.- Rajdhani Unnayan Kartipakkha, XVI ADC (AD) 2019, 173, [Cancellation of lease Rajuk Property.]**

Since the appellant is a nationalized jute Mill and is under the control and supervision of the BJMC it was not possible for the appellant to act independently.

Leave was granted to consider the submission that the judges of the High Court Division did not consider the issue of cancellation of the lease by the RAJUK on the plea of failure to make construction even though the appellant could not undertake the work of construction on the disputed plot as it was illegally declared abandoned as being vested in the Government by operation of law and the Mills authorities were practically trying to get the disputed plot released from the list of abandoned property so long .

The principle that in addition to breach of natural justice, prejudice must also be proved has been developed in several cases.

12. **Rana Surong-Versus.- Government of Bangladesh & others XVI ADC (AD) 2019, 183, [Locus-standi of aggrieved person.]**

The writ petitioner is the Headman (minister) of Jhemai Punjee. Their ancestors and other members of the tribe had/have been living in Jhemai punjee area from more than hundred years peacefully. The Deputy Director (Planning), Bangladesh Tea Board, issued a letter to the Assistant Director (in charge), Jhemai Tea Estate on 05.08.2010 giving permission for chopping down 2096 standing trees in Jhemai Tea Estate.

The appellant has relied upon and came to the court to enforce Article 18 of the Constitution, which is one of the basic principles of state policy and so, is not enforceable under article 102 of the Constitution and, as such, the appeal is liable to be dismissed.

When our constitution was adopted in 1972, the framers had not foreseen the importance of environmental preservation. This aspect did receive attention later and, in 2011, 15th amendment of the Constitution incorporated protection the natural resources, biodiversity, wetlands, forests and wildlife. Article 18A of the Constitution provides that the State shall endeavour to protect and improve the environment and to preserve and safeguard the natural resources, biodiversity, wetlands, forests and wild life for the present and future citizens. In the case where the problem of ecology is brought before the Court, the Court is bound to bear in mind article 18A which enjoins that the state shall endeavour to protect and improve the environment. It is our constitutional duty to safeguard the forests and wildlife of the country. The Constitution proclaims it to be fundamental duty of every citizen of Bangladesh to protect and improve the natural environment including forests. Depletion of forests would lead to ecological imbalance.

The main motto of social life is to live in harmony with nature. Ongoing environmental degradation that is going must now come to a stop. For balancing our environment, massive tree plantation in the country has become vital The adverse impacts of climate change and now acutely felt all over the country. Global warming is a worrying issue for us all.

13. **Nazimuddin Mondal & another –versus.- Kusha Mondal being Dead his heirs: 1(a) Son Md. Nasaruddin @ Nazor Ali being dead his heirs: 1(a) (i).Md. Kurman Ali & others, XVI ADC (AD) 2019, 576, [R.S. is not conclusive proof of title.]**

It is the established principle of civil law that the R.S. records of rights have got no presumptive value of its correctness.

It is a cardinal principle of law that the plaintiff must prove his case in order to get a decree in his favour. Time and again this Court has held that the weakness of the defendants case in no ground for passing a decree in favour of the plaintiff.

14. **National Bank Limited & another -versus.- M.R. Trading Company, represented by Alhaj Md. Mizanur Rahman & others, XVI ADC (AD) 2019, 340.**

Fraud and collusion are secret in its origin and inception. Collusion may be either apparent and patent or what is more common secret and covered by apparent show of honesty. A deliberate deception with the design of securing some unfair or undeserved benefit are elements of fraud and collusion which must necessarily be inferred from the circumstances, considering all the facts.

It is settled principle that the re ief which cannot be granted in the Rule should not be granted in the interim prayer. An interim relief can be granted only in aid of and as ancillary to be main relief which may be available to the party on final determination of his right in a proceeding .

Every person is liable to make full and correct statement in his petition Suppression of the fact of getting the Rule discharged and production of such non-est inter m direction at the time of filing of the contempt petition bringing allegation of violation of the said non-est interim order and obtaining Rule on such misconceived contempt petition is tantamount to practising fraud upon the court. Knowing full well about the non-existent inerim order, the respondent made false representation before the court of law with dishonest intention, so he is guilty of practising fraud upon the Court.

It is to be remembered here that it is the duty of the Judges to maintain high ethical standard and impartiality. It is duty of the Judges of act at all times in a manner that promotes public confidence in respect of the integrity and impartiality of the Judges and the judiciary as a whole.

Similarly, the lawyers being officers of the court are equally responsible to maintain the dignity, prestige and image of the court as well as the judiciary as a whole In this case, they totally failed to perform their duties as deserved by the court. Particularly, the lawyer, who filed contempt petition bringing allegation of violation of the interim order after getting the order discharging the Rule issued in Writ petition No. 13673 of 2017, must answer about his conduct and bona fide.

15. **S.M. Masud Hasan @ Masud -versus.- Judge, Artha Rin adalat No.3, Dhaka & others XVI ADC (AD) 2019, 366, [Order XXI Rule 85 of the Code of Civil Procedure, 1908]**

In a case where an auction purchaser fails to deposit the money within fifteen days, there is an imperative duty cast upon the executing court itself to set aside that sale and to order resale of the property" Order XXI, rule 85 of the Code requires that the full amount of the purchase-money shall be paid by the auction purchaser into Court before the court close on the 15th day from the sale of the property. Rule 86 also requires that in default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit after defraying the expenditure, be forfeited to the Government and the property shall be resold. When the default is made in depositing the balance of the amount as required by Rule 81, the court ought to order the re-sale of the property.

Since the instant auction was held under Artha Rin Adalat Ain, 1990 which did not provide specific procedure to be followed for holding auction and as to time limit for payment of auction money, the Adalat followed the provision of the Code of Civil Procedure rightly.

16. **The Anti-Corruption Commission (Duduk), represented by its Chairman Head office, 1, Segunbagicha, Ramna, Dhaka-versus.- Mohammad Shafiul Alam & another, XVI ADC (AD) 2019, 386, [Offfence under sections 409/420/119/109 of the penal Code read with section 5(2) of the Act II of 1947.]**

Time limitation to complete investigation as stipulated in section 20 Ka of the Durnity Daman

commission Ain is mandatory in nature. He submits that there is no such provision in section 20Ka of the Ain that in case of failure to conclude investigation shall be stopped or dropped.

If the Investigating Officer fails to complete investigation within the time stipulated or within extended time, the Commission shall appoint another Investigating Officer for holding Investigation within 90 working days and departmental action would be taken against first Investigating Officer in accordance with law. We do not find any such default clause in section 20ka that if the Investigating officer fails to complete the investigation within stipulated time or extended time the proceeding shall stand stopped or to be dropped. The only provision is that is the Investigation officer fails to complete the investigation within time, the commission shall appoint take step against the Investigating Officer.

17. **Md. Nurul Alam alias Dr. Hazrat Shah Sufi Mohammad Nurul Alam-versus.- Saleha Khatoon & others, XVI ADC (AD) 2019, 407, [Section 241A of the Code of Criminal Procedure, 1898]**

However upon consideration of the relevant provision of section 345(2), we find that an offence under section 406 and 408 of the penal code can be compounded only by the owner of the property in respect of which breach of trust has been committed. In the instant case the informant was neither the owner or trustee nor had any function in the administration of the trust. He was simply the Vice-president of the Mosque of the trust. Therefore, by no stretch of the imag nation could he be said to have any proprietary interest in the trust property Simply it can be stated that he is not the owner of the property in question. Not being the owner of the trust property, the informant did not have the capacity to compound the case. Therefore, the order passed by the Chief Metropolitan Magistrate compounding the offence was patently illegal.

18. **The Managing Director, Titas Gas Transmission & Distribution Company Limited –Versus.- Faruque Hasan & others, XVI ADC (AD) 2019, 262.**

The petitioner was placed under suspension by order dated 29.07.1992 on account of a criminal charge. The writ petitioner himself resigned from the service he connote have any legal right or legitimate expectation to be reinstated in the service.

Be that as it may admittedly the writ petitioner submitted his resignation to Titas during caretaker Government and his resignation was also accepted by Titas. The petitioner has failed to show us any iota of evidence that he filed any police case for allegedly obtaining his resignation letter forcibly at any time all date. The names/name of the person/persons. Who allegedly obtained his resignation letter forcibly has not also been disc osed in the writ petit on. Rather some vague and wild allegations have been made in the Writ petition without mentioning the names/name of the persons/person who was responsible for obtain his alleged forced resignation letter, further the writ petitioners resignation letter is admittedly dated 24.02.2008 and representation/application for his reinstatement is on 07.02.2010. But he filed his writ petition on 1.03.2017. i.e. long after more than 7 (seven) years from the date of submissions of representation/application for reinstatement to the Adviser to the Prime Minister. Thus it is evident that the writ petition was filed with an inordinate delay of more than nine years from the date of resignation and more than seven years from the date of submission of his application for reinstatement without any satisfactory reasons.

19. **Government of Bangladesh, represented by the Secretary, Finance Department, Ministry of Finance –Versus.- Md.Salim Khan, XVI ADC (AD) 2019, 267 [Policy decision of the Government in relation to Relief and Disaster fund]**

The decisions and steps taken for protection of the villages from the erosion of the river Megna are totally executive decisions of the Government. The policy decision of the Government may be interfered with only when the same is illegal or unconstitutional or shockingly arbitrary in the wednesbury sense. It is the duty of the policy maker to decide how a village would be protected from erosion of a riverand what would be the acceptable proposal for embankment works and what would be the proper way of implementation of proposal of embankment considering the

financial capacity of the Government.

The constitution has demarcated the limitation of the Executive, Legislature and Judiciary for exercising their respective jurisdictions and one cannot transgress the authority ignoring the constitutional limitation. The scope of judicial enquiry over the subject matter in issue is limited. If the decision taken by the Government is against the statutory provisions or is violative of the law then only the High Court Division can examine the same, but it is absent in this case.

20. **Government of Bangladesh, represented by the secretary Ministry of Education & others –Versus.- Md. Alauddin & others, XVI ADC (AD) 2019, 293**

Enlistment in the MPO of a college for providing MPO and other benefits to its Lectures/teachers and staffs depends upon the policy decision of the Government following relevant provision of laws, guidelines, etc. If the college and the writ petitioners fulfilling all such criteria for enlacement in the MPO, in such case it is the Government to take decision in the matter The college as well as the writ petitioners may make further representations to the Government and the Government would decide the matter. Sitting in a writ jurisdiction, there was hardly any scope to decide as to which college is entitled to be included in the MPO for MPO and other benefits to its teachers or teaching staffs.

It is established principal of law that so long the school continues functioning and is not abolished in accordance with law the teachers and employees of such school are entitled to get their salaries MPO and other allowances. This view finds support from the case law of the secretary, Ministry of Education, Government of the People's Republic of Bangladesh & others Vs Md. Anower Hossain & others reported in 2 MLR (AD) 25.

21. **The state- versus.- Professor Dr. Morshed Hasan Khan, XVI ADC (AD) 2019, 298, [Section 497A, and 498 of the Code of the Criminal procedure, 1898]**

The words "in any case" do away with the distinction made in section 497 between cases punishable with transportation for life and death and cases involving lesser penalty. Similarly the use of the words 'any person' confer jurisdiction in respect of person who may not be under arrest and does not appear in obedience to the process issued by the court or are not brought before the court as envisaged in Section 497. It is the effect of these words which, in may opinion, justify grant of bail before arrest and not the subtle difference between the words 'release on bail' and 'admit to bail' used in section 497 and 498 respectively.

The Court granting anticipatory bail will be at liberty to cancel the bail if a case for cancellation of bail is otherwise made out by the state or complainant

22. **Government of Bangladesh & others –versus.- Md. Tariqul Islam XVI ADC (AD) 2019, 492, [Government servant Disciplinary Appeals Rules, 1985]**

We are of the considered view that before imposing major penalty the cardinal principle of natural justice requires that copy of the enquiry report has to be supplied to the concerned employee: Thus the order of the Administrative Appellate Tribunal cannot be said to be unlawful. The Administrative Appellate Tribunal correctly decided this question.

Government servant disciplinary Appeals Rules, 1985 is also applicable in case of departmental proceeding of the persons who are working in RAB on deputation and rule 7(5) of the said Rules 1985 also requires furnishing of a copy of inquiry report to the person against whom departmental action is being taken

23. **Abdul Aziz, represented by constituted Attorney Abdul Haque-versus.- Unideb (BD) Limited, represented by its Director & others XVI ADC (AD) 2019, 498, [Section 96 of the State Acquisition and Tenancy Act, 1950]**

To believe or disbelieve a witness is within the domain of the courts below and the High court Division in exercise of its revisional jurisdiction cannot interfere in such domain unless there is misreading or non-reading of evidence on record by the courts below. The High Court Division

reversed the concurrent findings of facts of the courts be ow without pointing out any misreading or non-reading of evidence on record. Having considered the findings of the Courts below, we find that those are based on evidence on record

24. **Prafullah Kumar Halder & others-versus.- Kamakshya Ranjan Halder & others XVI ADC (AD) 2019, 140, [Indian Succession Act, 1865, Hindu wills Act, 1870, Probate and Administration Act, 1881.]**

When a will is put forward, the burden is on the propounder of the will to prove that the will has been executed voluntary by the testator after being fully aware of the contents and consequences of the bequeath made in the will and attesting witnesses have signed the will in presence of the testator. By free and capable testator is generally meant that the testator, at the time when he made the w ll, had a sound and disposing state of mind and memory. Mere ability to sign does not imply full mental powers for valid disposition. It is not sufficient that the man was able to answer easy questions but the testator must have a disposing mind so as to dispose of his property with understanding and reason.

Landmark Decisions of the Supreme Court of Bangladesh in the Year of 2020.

1. The Director General, represented by Bangladesh Rural Development Board (BRDB), Dhaka-Versus- Md. Rabeul Karim and others, [2020] 28 BLT[1] 52 (AD)[2], [Article 102 of the Constitution of Bangladesh]

All the statutory bodies/Corporations/autonomous organizations must strictly follow their respective service Rules while making any recruitment in any permanent post.

Government has no authority to issue any orders granting regularization/absorption or appointment in violation of the Constitutional scheme and recruitment rules in force. All recruitment in matters of Public employment must be made in accordance with prevailing rules.

It is the duty of the Government/employers to provide some benefits to them, on the basis of the period of service they rendered, so that they may not fall in extreme hardship otherwise the families of the those employees would face economic ruination. However, sympathy, empathy or sentiment by itself, cannot be a ground for passing an order where the litigants miserably fail to establish legal right. It is true that the respondents had been working for a long time, the same by itself would not be a ground for directing regularization of the serv ce. In view of the discussion made above, This Court is of the view that the writ petitioners are not entitled for any relief as sought for.

2. Fazlul Haque (Md) Sarder and others-Versus-Grameen Phone Limited and others, [2020] 72 DLR[3] 204 (AD) [Article 104 of the Constitution of Bangladesh, 1972]

In exercise of power and the authority vested by the Constitution under Article 104, it is ordered that any per od of limitation in filing petitions/applications/suits/appeals/revisions/all other proceedings, civil, criminal or administrative, under general or special laws, which expired on or after 26 March, 2020 stands extended till 31stAugust, 2020.

3. Anti Corruption Commission-Versus-Md Ahsan Ali and others, [2020] 72 DLR 206 (AD) [Article 102(2), 103(1),(2),(3) of the Constitution of Bangladesh, 1972]

Since the Act is not applicable in the case of the writ petitioner and since he had no other equally efficacious alternative remedy available in any other forum provide by any law, the writ petition is maintainable.

Under Article 103(3) of the Constitution, the Appellate Division has been vested with the jurisdiction to hear and determine any appeal from judgment, decree, order or sentence of the High Court Division in a case to which clause (2) does not apply, only if leave to appeal is granted by this Division except in three cases as spelt out it Articles 103(1), (2) and (3) of the Constitution where appeal to this Division is a matter of right.

1 BLT – Bangladesh Law Times
2 AD – Appel ate Division
3 DLR – Dhaka Law Reports

4. Government of Bangladesh, represented by the Secretary, Ministry of Defence and others-Versus-Aminul Haq, represented by its constituted Attorney Mujtaba Quli Khan, [2020] 72 DLR 246 (AD) [Section 330 Arbitration Act, 2001]

While passing an award the arbitrator must consider the evidence produced before him otherwise it will not be an award at all.

The action of the arbitrator amounts to misconduct when arbitrator ignores material documents produced and no award can be given without any basis and an arbitrator must look into all the papers and documents produced before it prior to making an award.

The respondent has not prayed for interest but the High court Division has given 16% interest to the contractor till realisation of award passed by the Arbitrator. Giving such interest to the respondent without any claim by it is nothing but a gratuitous relief which is not permitted by law and even no reason was assigned therefor. We do not approve of giving such interest without any prayer made by the respondent.

5. Government of Bangladesh-Versus-Syed Mamun Mahbub, [2020] 28 BLT 260 (AD) [Article 108 of the Constitution of Bangladesh, 1972]

The sum and substance of the submissions placed before us by the learned Advocates from the Bar is that the contemnor does not deny or seek to justify the words which he has used and published in the social media. It is also not denied that the words are contemptuous and lower the dignity of the Honourable Chief Justice, the Supreme Court of Bangladesh and the administration of justice.

The contemnor stood in the Courtroom with folded hands and apologized. Briefly, what he said is quoted below verbatim: " .. with folding hands, my lord I beg unconditional apology my lord and serious, I don't say a error, a serious offence by me. Seriously my lord I am repented." The learned Advocates made reference to the respectable family background of the contemnor, including the fact that his wife is a practicing Advocate and that his father was a Freedom Fighter. We have sympathy for the family of the contemnor and understand that they must be distressed by his present circumstances. The contemnor's wife as well as the learned Advocates who appeared on his behalf all gave assurances that he would not commit such an offence ever again in the future. We find that the contemnor has admitted his guilt. However, in view of his apology and assurance that he will never commit such offence again, and the fact that he has refrained from appearing before any Bench of the Supreme Court as ordered by this Court, we are not inclined to take the matter any further.

6. Md. Mitul Mollah-Versus-Abul Khayer Mollah and others, [2020] 28 BLT 278 (AD) [Article 104 of the Constitution of Bangladesh, 1972]

Since admittedly the mortgagor respondent, is still in possession of the auction sold property and since for more than 14 years the petitioner is deprived of enjoying the property after depositing the entire bid money in Court immediately after the auction sale and got the registered sale deed in his favour and since the mortgagor respondents are in possession of their ancestral property and they want to retain the same we feel it reasonable to direct the mortgagor respondent to deposit TK.40,00,000/ (TAKA forty lacs) as solatium to the auction purchaser petitioner within 45 days and file compliance thereof and thereby settle the matter once for all. However, on payment of the said solatium amount of Tk.40,00,000/- by the mortgagor respondent to the auction purchaser petitioner the bank will release the property

from mortgage and handover the title documents to the mortgagor and as such the auction purchaser shall have no right, title and interest on the suit property pursuant to auction sale. In case any deed of transfer is registered in favour of the auction purchaser the same will stand redundant. The bank as well as the auction purchaser are directed to handover the title deed of the mortgaged property to the mortgagor-respondent on payment of the aforesaid amount of TK.40,00,000/- (Taka forty lacs).

7. Palash Chandra Saha-Versus-Shimul Rani Saha and others, [2020] 14 SCOB[4] (AD) [Suit for declaration, Adoption;]

The adoptive father of the child to be adopted must belong to the same caste and that adoption would be valid if they belong to different sub-division of the same caste.

According to Hindu Law any act done in contravention of the Hindu texts which are in their nature mandatory cannot be said to be lawful by applying the principle of factum valet. Hence, the principle of factum valet is ineffectual in the case of adoption in contravention of the provision of legal texts.

Even if he was accepted as a family member, the legality of the adoption must be considered. The provision of Hindu Law is clear that there cannot be adoption across castes. In other words, a child from one caste cannot be legally adopted by a member of another caste.

8. Md. Abul Kaher Shahin-Versus-Emran Rashid and another. [2020] 14 SCOB AD [Dishonour of cheque, Section 118, 138 of the Negotiable Instruments Act, 1881;]

Once there is admission of the execution of the cheque or the same is proved to have been executed, the presumption under section 118(a) of the Act is raised that it is supported by consideration The category of "stop payment cheque" would be subject to rebuttal and hence it would be an offence only if the drawer of the cheque fails to discharge the burden of rebuttal. The accused person can prove the non-existence of a consideration by raising a probable defence. If the accused discharges the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the complainant. He will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to grant of relief on the basis of negotiable instrument.

Where the amount promised shall depend on some other complementary facts or fulfillment of another promise and if any cheque is issued on that basis, but that promise is not fulfilled it will not create any obligation on the part of the drawer of the cheque or any right which can be claimed by the holder of the cheque.

9. Abul Kasem Md. Kaiser-Versus-Md. Ramjan Ali and others, [2020] 14 SCOB AD [Pre-emption, Extinguishment of Co-sharership;]

The 62 DLR case has not overruled the contention that 'only by a partition suit or partition deed the co-sharership is extinguished'. So in this case by separating the Jama the pre-emptor and/or his predecessor having already lost her/his character of co-sharership in the case jote so the pre-emptor is no more a co-sharer and as such his right to pre-empt as a co-sharer does not exist anymore Not only separation of Jama/Khatian by a party will cause him to cease to be a co-sharer in the jama but co-sharership will also be ceased by a final decree in a partition suit

4. SCOB = Supreme Court Online Bulletin

or by a registered deed of partition. That means either of the two will cause a person to cease his co-sharership in the case jote.

The appellant cannot take the plea of non service of notice upon the other party once he has taken benefit of such mutation or separation of "Jama". Such plea,if any, can be taken only by the party affected by it or to whose disadvantage the same has been obtained and upon whom the notice was required to be served. But not the person at whose prayer separation has been made and who takes the benefit of such separation.

10. Md. Shahjahan Khondakar-Versus-Managing Director, Grameen Bank, Head Office, Mirpur, Dhaka and others, [2020] XVII ADC[5] 311 [Contempt petition for not complying with the Judgment and order]

Then the contemnor respondents paid some lump sum amount of due salaries and allowances to the petitioner, but intentionally still did not pay the entire legitimate due salaries, time-scales and increments of the petitioner, since due till date, which is amounting to TK.58,80,870/ (Fifty eight lac eighty thousand and eight hundred seventy taka) including 25% compensation from the date of the order of the Administrative Tribunal. The petitioner then filed application for payment of all his arrear dues in accordance w th the decision of this Division which, ultimately was refused by the bank

Accordingly, the respondents are hereby directed to pay all salaries and other benefits and dues of the present petitioner from 26.02.1998, the date of his demotion to a lower rank, till the completion of h s service in the bank, subject to adjustment of any money received by the petitioner, within 3(three) months from date.

11. Amena Chowdhury Kheya-Versus-Bangladesh, represented by the Secretary, Ministry of Home Affairs, Bangladesh Secretariat, Ramna, Dhaka and others, [2020] XVII ADC 344 [Guardian and Wards Act, 1890]

When disposing the family suit, the Family Court is at liberty to pass any order with regard to custody that it may consider appropriate at the relevant time, keeping in view the pr nciples regarding custody and the best interests of the child.

12. Nishat Jute Mills Limited represented by Abul Kalam Azad-Versus-Human Rights and Peace for Bangladesh (HRPB) and others, [2020] XVII ADC 401 [Article 102 of the Constitution of Bangladesh, 1972]

The Government/concerned authorities must bear in mind that at the time of survey, it shall always start the survery from C.S map and then go to R.S map and not the other way round.

Since, We have heard both the parties at length, we do not think it necessary to grant any leave in this matter which would unnecessarily delay the matter further and thereby allow the unauthorized land/river grabbers to continue with their unlawful possession, further encroachment of the river and thus, destroy the environment of our beloved country, Bangladesh.

5 ADC = Appellate Division Cases

13. Government of Bangladesh and others-Versus-Arifur Rahman and others, [2020] XVII ADC 419 [বেসরকারী শিক্ষক নিবন্ধন ও প্রত্যয়ন কর্তৃপক্ষ আইন, ২০০৫]

Shortly, the Procedure is that the NTRCA shall prepare list of qualified candidates with due regard to the number of vacancies of the teachers which fall vacant in course of the year and that the list of candidates so prepared shall be published by notification. The recommendations of the NTRCA for selecting suitable candidates as teachers ought to get the respect it deserved. Preparation of long list ignoring statutory provision and reasonableness has created the present situation which the authority is facing and, consequently, the writ petitioners have been suffering. In such view of the matter, the High Court Division did not commit any substantial wrong in its direction.

14. National Housing Authority-Versus-Alauddin and others, [2020] XVII ADC 442 [Requisition of Property Act, 1948]

Since the writ petitioners claimed that they had title to and possession in respect of a portion of the landed property within the area of City corporation and became destitute due to acquisition of their properties, they should be provided with small segment of plots in the acquired land for their rehabilitation. When private land is acquired for public use, fair rehabilitation of the land owners, who are directly affected for loss of their livelihoods, should be taken into consideration by the Government first.

15. Government of the People`s Republic of Bangladesh, represented by the Divisional forest Officer, Mymensingh–Versus-Mr. Abdur Sobhan and others, [2020] XVII ADC 678 [Condonation of delay]

The individual would always be quick in taking the decision whether he would pursue the remedy by way of an application since he is a person legally injured while the State is impersonal machinery working through its officers or servants.

Considering the legal principles, the inevitable conclusion is that the delay of 1477 days deserves condonation. Therefore, the judgment and order of the High Court Division refusing to condone the delay is set aside. The High Court Division is directed to hear the revisional application as a motion.

16. Government of Bangladesh and others-Versus-Jannatul Ferdous and others, [2020] XVII ADC 681 [Creation of new Post in Government office]

The candidates from the Union or Ward, where the post is vacant would be given preference. When the fact was revealed that the respondent No.1 is an inhabitant of Kishoregonj not of Itna Upazila, the appellant writ respondents restrained themselves from giving her appointment in the post and filled the said post with the writ respondent No.4, who already had joined his office before filing the writ petition. Considering this aspect, the High Court Division did not interfere with the appointment of the writ respondent No.4. However, the High Court Division directed the appellant respondents No.1-3 to appoint the respondent No.1 writ petitioner in an equivalent or similar post within the District which could not be carried out by the appellant writ respondent, because no vacant post was available at the relevant time. Hence, the order passed by the High Court Division was not executable, as there was no equivalent post or similar post in the office of the writ-respondent No.3 vacant at that time. Furthermore, the writ respondent had/has no authority to create any new post in his office. Creation of any new post in any government office is absolutely under the domain of the Government, more particularly, under the domain of the Ministry of Public Administration and the Ministry of Finance.

17. Anowarul Hoque being dead his heirs 1(a) Md. Ruhul Amin and others-Versus-Mohammad Tafazzal Mondal and others, [2020] XVII ADC 495 [The Code of Civil Procedure, 1908 Order XXXII, rule 4 (4)]

The Rule insofar as the appointment of the acting Nazir/Naz r as guardian in contravention of the provision of Rule 843 (1) (2) of the Civil Rules and Orders and Order XXXII, rule 4 (4) of the Code of Civil Procedure, 1908 was illegal and without jurisdiction.

In view of the above facts and circumstances, we are satisfied that a substantive legal point has been raised n respect of the appointment of guardian for the minor defendants. Since they were not properly represented in the suit, the ex parte decree cannot be sustained, and is thus liable to be set aside.

18. Mozammel Hossain @ Fakir-Versus-The State, [2020] XVII ADC 638 [The Penal Code, 1860, Section 304A]

The learned Additional Sessions Judge, Feni (the trial Court) in Sessions Case No. 117 of 2003 convicting the conv ct appellant-petitioner Mozammel Hossain @ Fakir (shortly, Fakir) under section 302 of the Penal Code, 1860 (shortly, the Penal Code) and sentencing him thereunder to suffer rigorous imprisonment for life and also to pay a fine of TK. 2000/- (two thousand), in default, to suffer rigorous imprisonment for 3(three) months more.

In the above circumstances, the order of conviction and sentence under section 302 of the Penal Code is converted/ modif ed to conviction under section 304A of the Penal Code and the convict petitioner is sentenced to rigorous imprisonment for five years under section 304A of the Penal Code.

19. Most. Nazmun Nahar Mukta-Versus-Md. Lutfor Rahman, [2020] XVII ADC 884 [The Dowry Prohibition Act, Section 4]

When the matter came before us, we felt inclined to modify the order of access .n favour of the mother to the effect that both children would go the to house of the mother on every alternate Thursday evening at about 7:00 PM and the responsibility of collection of the children from the house of the father would fall upon the mother. The children would leave the house of the mother on the following Saturday morning at 9:00 AM and the responsibility of collecting of the children would fall on the father. We may add here that since the children are now almost 12 years of age, they need not be personally accompanied by the father or the mother on the journey to and from the house of the mother or the father. We would also add that since the children are now quite capable to understanding their circumstances, if at any time either of them wishes to visit his mother or to stay with her for some days, he shall not be prevented or hindered in any way by the father or any of his relatives.

20. M/S. Motazzerul Islam (Mithu) and another-Versus-ICB Islami Bank Limited and others, [2020] XVII ADC 889 [Artha Rin Adalat Ain, 2003]

Thus clearly the establishment of the Artha Rin Adalat was exclusively for the purpose of hearing suits instituted by financial institutions for the recovery of their loans and the rules of procedure were provided in the Ain itself. Therefore, it is the prerogative of the financial institutions and a mandate of the law that all financial institutions shall file suits for recovery of their loans in the Artha Rin Adalat. Such a prerogative cannot be thwarted nor the mandate avoided. Moreover, the exclusivity of the jurisdiction can not in any way be infiltrated or obfuscated by any counterclaim, set off or separate suit of the loanee.

Landmark Decisions of the Supreme Court of Bangladesh in the Year of 2021.

1. **Durnity Daman Commission-Vs.-GB Hossain and other, 74 DLR (AD) 1 [Article 36 of the Constitution of Bangladesh, 1972]**

   No person can be deprived of his right to go abroad unless appropriate authority exercising its lawful power imposed restriction upon him. If a person's fundamental right under Article 36 is infringed, the State can rely upon a law to sustain the action .....(Para 18)

   Under Article 36 freedom of movement is one of the fundamental rights guaranteed to every citizen of the country which cannot be abridged or denied arbitrarily on mere liking disliking without any specific law authorizing lawful justification for this purpose. The reasonableness is to be determined by an objective standard and not subjective one .....(Para 21)

   The protection it secures is limited one In no case may a person be arbitrarily deprived of the right to enter his or her own country, and that there are few, if any, circumstances in which deprivation of the right to enter a person's own country could be considered reasonable. Legislation which arbitrarily or excessively invades the right cannot be a proper balance between the freedom guaranteed and the general welfare . .(Para 24)

2. **Government of Bangladesh, represented by the Secretary, Ministry of Housing and Public Works, Dhaka and others-Vs.-Tahera Begum, wife of late Md Serajul Islam and others, 73 DLR (AD) 356 [Abandoned Buildings (Supplementary Provisions) Ordinance, 1985]**

   No notice has been served upon the original lessee, or the predecessor of the respondents. As the original lessee was in possession of the suit land at the time of selling of the land and thereafter, the predecessor of the respondents had been enjoying the possession of the same, the inclusion of the case property in the list of the abandoned buildings cannot be said to have been done legally rather it was done without lawful authority

3. **Aziz @ Azizul @ Azid and others-Vs.-State, 73 DLR (AD) 365 [Sections 164(3) & 376 of the Code of Criminal Procedure, 1898]**

   When the voluntary character of the confession and truth are accepted it is safe to rely on it. Indeed a confession, if it is voluntary and true and not made under any inducement or threat or promise, is the most patent piece of evidence against the maker. A confession may form the legal basis of conviction if the court is satisfied that it was true and was voluntarily made ..... (Para 21)

   It is the duty of the Court to respond to the cry of the society and to settle what would be a deterrent punishment for an abominable punishment. Two widows, having had no male member of their families and had been maintaining their livelihood by selling sarees in different villages, were somehow brought in a field in the late night and the convicts not only raped them but also killed them mercilessly Both the victims died with a painful death Considering the nature of crimes, we do not find any mitigating circumstances to commute the sentence .....(Para 24)

4. **Government of the People's Republic of Bangladesh, represented by the Secretary, Ministry of Education and others-Vs.-Kanij Salma, Lecturer of the Department of History of the Dhaka Women college and others, 73 DLR (AD) 295 [Article 102(2) of the Constitution of Bangladesh, 1972] [Audi alteram partem]**

   Filing on an appeal is not an efficacious remedy and the writ petition filed by respondent No.1 was maintainable Before delisting the name from the list of MPO, no notice for showing cause was served upon her and, as such, the principle of natural justice has been violated.

5. **Abdus Samad @ Md Abdus Samad-Vs.-State, 73 DLR (AD) 128 [Sections 300 & 304 part 1 of the Penal Code, 1860]**

Even if the accused causes hurt with the intention of killing or causes such bodily injury as it likely to cause death, but if the act of the accused falls within the ambit of any exception to section 300 of the Penal Code, 1860, then the accused would be punished for culpable homicide not amounting to murder.

6. **Chairman, Anti-Corruption Commission-Vs.- Omar Faruk and others, 73 DLR (AD) 218 [Sections 115 of the Evidence Act, 1872 & Section 367 of the Code of Criminal Procedure, 1898]**

Estoppel is based on the principle that it would unjust, if a person intentionally by conduct or in any other manner has induced other person to believe and act upon such a representation, neither he nor those presenting can in a subsequent court proceeding deny the truth. Estoppel is a rule of civil actions. There is no theory of estoppel in the matter of defence taken by the accused in the trial .....(Para 12)

A Judgment has a significant social and civil function. After hearing the facts of case, evidence, law points, arguments etc, the Court will be in a position to pronounce the conviction or acquittal. The purpose for writing good judgment depends much on adherence of the independence, impartiality, fairness and competence. Failure to do so , sprit of judgment will be dying behind the close door. The soul of a judgment are the reasons for arriving at the findings. Before recording finding on a charge, the relevant evidence must be considered and discussed the submissions made on behalf of the parties. The method of arriving at a conclusion is the most important part writing judgment .....(Para 15 & 16)

7. **Shafiqul Islam-Vs.-State, 73 DLR (AD) 189 [Section 164(3) of the Code of Criminal Procedure, 1898]**

If the confessional statement of the appellant made under section 164 of the Code is considered in conjunction with other evidence on record then it cannot be said that his confessional statement is true and voluntary ..... (Para 26)

There are inconsistent statements as regard identification of the appellant by the torch light at the time of incident and the alleged story of apprehension of the appellant on the spot is totally false. Curiously enough, a new story was cooked up subsequently and if the appellant was apprehended on the spot as an assailant of the victim, there was no reason for filing initially a UD case and then a GD entry without mentioning the name of the appellant as the assailant. The evidence of PW 4 and 5 is a downright falsehood . ..(Para 24)

8. **Shukur Ali (Md) and another-Vs.-State, 74 DLR (AD) 11 [Section 30 of the Evidence Act, 1872]**

The confessional statement of a co-accused can be used for the purpose of crime control against other accused persons even if there is a little bit of corroboration of that confessional statement by any sort of evidence either direct or circumstantial .....(Para 70)

In order to pursue a model of crime control in this regard, this court is willing to admit, in such rare instances, the confession of a co-accused as incriminating evidence against the other accused. Albeit, such evidence is still circumstantial. The principle of the right against self incrimination is also accompanied by the principle that upon silence on part of those incriminated, adverse inferences may be drawn at any stage of the trial and pre-trial procedures ..... (Para 67, 68 & 72)

Confessions by a co-accused are generally inadmissible against the accused in a concerned case. In our duties of administering justice, we are sometimes faced with a case that forces us to consider aspects of larger policy at play. The balance between crime control and due process models of justice is such a consideration that requires reassessment with changing times and upon the fact of each case. The case before us is one of such a heinous crime, where measures of control are made far more necessary, to ensure that justice can be brought to the victim in question. As such, while due process is still of utmost importance; crime control considerations must be made as well .....(Para 63, 64, 65 & 66)

9. **State-Vs.-Aslam Shikder, 74 DLR (AD) 25 [Article104 of the Constitution of Bangladesh, 1972]**

It is true that the matter of granting bail to any accused is within the discretion of the Judge considering the bail application, but bail cannot be granted to an accused whose bail order has been stayed by the apex Court. Discretion must be exercised judiciously and any such application must be scrutinised in the light of all the facts and circumstances of the case and the evidence and materials on record. It is highly improper to grant an accused bail when the case is ready for pronouncement of judgment, especially when the allegation is of an offence so serious as rape and when bail has been consistently refused by all the Courts.

10. **Mamun @ Mamun Ar Rashid-Vs.-State, 74 DLR (AD) 36 [Section 106 of the Evidence Act, 1872]**

When wife dies within the custody of her husband, the husband is to explain the cause of her death. The deceased was admittedly living with the condemned-appellant at the relevant time and thus the condemned-appellant was obliged to give an explanation as to how his wife had met with her death although normally an accused is under no obligation to account for the death for which he is on trial.

11. **Ashfaq Hossain-Vs.-State and another, 74 DLR (AD) 40 [Section 138 of the Negotiable Instruments Act, 1881 & Section 561A of the Code of Criminal Procedure, 1898]**

Issuing and signing of the cheques would be proved at the trial. Whether he managed the affairs of the company or not is a disputed question of facts. The High Court Division was not justified in passing the impugned judgment considering the documents submitted before it. The High Court Division was based upon disputed question of facts and defence materials, those materials were not submitted at the trial Court, rather, directly sbmitted before the High Court Division for consideration in the proceedings under section 561A of the Code. The complaint has no occasion to know about the transfer of shares beacuse it is the internal affairs of the accused and his company which ought not have scrutinized bt the High Court Division while exercising its inherent jurisdiction. On the basis of such defence materials quashing of the proceedings of the 3 (three) cases out of 5 (five) in serious error of law .....Para 27 & 28)

The Court is required to look into the allegation made in the FIR or petition of complaint that whether the same discloses any offence or not, but the High Court Division is not justified in invoking its inherent power on the basis of defence materials .....(Para 30 & 31)

12. **Anowar Hossain-Vs.-State, 74 DLR (AD) 55 [Section 374-376 of the Code of Criminal Procedure, 1898]**

Length of period spent by a convict in the condemned cell is not necessarily a ground for commutation of the sentence of death. However, where the period spent in the condemned cell is not due to any fault of the convict and where the period spent there is inordinately long, it may be considered as an extenuating ground sufficient for commutation of sentence of death .....(Para 52)

The principle of circumstantial evidence to prove the guilt of an accused is that the prosecution has to prove the circumstantial evidence beyond reasonable doubt and the chain of circumstances should be cogent and consistent showing that the accused is compatible with the circumstances. In a case based on circumstantial evidence, before any hypothesis of guilt can be drawn on the basis of circumstances, the legal requirement is that the circumstances themselves have to be proved like any other fact beyond reasonable doubt .....(Para 48)

13. **Shamim @ Shamim Reza-Vs.-State, 74 DLR (AD) 103 [Sections 35A, 374 and 376 of the Code of Criminal Procedure, 1898]**

On consideration of his age at the time of commission of the offence, the condemned-appellant should be given a chance so that after suffering the prolong sentence, he could lead an orderly life and become a

law abiding citizen of the country. We are inclined to commute the sentence of death imposed upon the condemned-appellant to imprisonment for life. Sentence of death is commuted to one for imprisonment for life. He will get the benefit of section 35A of the Code and other remissions as admissible under the Jail Code.

14. Aminul Islam-Vs.-State, 27 BLC (AD) 35 [Circumstantial Evidence]

The act of absconding is relevant piece of evidence to be considered along with other evidence. Police recovered blood stained shirt, lungi and mobile set of victim from the custody of the appellant which was enough to connect him with the occurrence. Particularly, recovery of mobile phone from the appellant can be held as a determining link in completing the chain of circumstantial evidence which proved beyond reasonable hypothesis that of the guilt of the appellant.

15. Kanai Chandra Das being dead his heirs-Reba Rani and others-Vs.-Nipendra Chandra Mondal, 27 BLC (AD) 1 [Section 112 of the Evidence Act, 1872]

An innocent child may be the victim of our decision. In such circumstances, the Court has to consider diverse aspects including presumption under section 112 of the Act. The legal presumption as per provision of section 112 of the Act has the effect of throwing the burden of proving the illegitimacy of a child satisfying its requirements on the person interested in making it out. This provision has been treated by the apex Courts of the subcontinent as the general law determining the legitimacy is the questions involving rights of inheritance. The presumption being highly followed by law, the proof of non-access must be clear and satisfactory.

16. Mujibur Rahman alias Mujibur Rahman-Vs.-State and another, 26 BLC (AD) 373 [Section 423 of the Code of Criminal Procedure, 1898 & Sections 10 and 9(4)(kha)of the Nari-o-Shishu Nirjatan Daman Ain, 2000

The High Court Division allegedly passed a greater sentence without issuing any rule upon the convict-petitioner. Principles of natural justice demands that the sentence imposed on the accused cannot be enhanced without giving him/her the opportunity to be heard on the action to be taken .....(Para 16)

The High Court Division altered the conviction from section 10 to section 9(4)(Kha) of the Ain and thereby enhanced the sentence imposed upon the convict-petitioner without giving show cause notice or issuing any Rule upon him and such enhancement has been done without following the due process of law as provided in the statute. Since the allegation of section 10 of the Ain, 2000 has been proved by adducing witnesses from the prosecution, the judgment and order of the Tribunal is thus restored .....(Para 17 & 18)

17. Government of the People's Republic of Bangladesh, represented by the Secretary, Ministry of Finance, Bangladesh Secretariat, Dhaka & Another -Vs.- MNH Bulu and others, 27 BLC (AD) [Article 102(2) (a)(i) of the Constitution of Bangladesh]

It is well settled now that second part of clause (2)(a)(i) of the Article 102 of the Constitution confers power on the High Court Division to issue Writ in the nature of mandamus to compel a person performing functions in connection with the affairs of the Republic or a local authority to do something that he is required by law to do.

18. Mahbubur Rahman Titu (Md)-Vs.- State, 27 BLC (AD) [Sections 164 & 364 of the Code of Criminal Procedure, 1898]

The provisions of sections 164 and 364 of the Code emphasise an inquiry by the Magistrate to ascertain the voluntary nature of confession. This inquiry appears to be the most significant and an important part of the duty of the Magistrate recording the confessional statement of an accused. Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which

he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution still lurking in the mind of an accused. It is established principle that the confessional statement is sufficient to convict its maker if it is found that the same was made voluntarily and true and recorded following the provisions provided under section 164 and 364 of the Code of Criminal Procedure.

19. Anti-Corruption Commission -Vs.- Ezbahul Bar Chowdhury and others, 27 BLC (AD) 63 [Section 242A of the Code of Criminal Procedure, 1898]

Section 242A of the Code provides that at the time of framing charge if the Magistrate considers the charge to be groundless, then the Magistrate can discharge the accused. The term 'groundless' in this connotation denotes the evidence or materials produced before the Magistrate are insubstantial, insignificant, trivial and there exists no sufficient reason to bring the accused under trial. If this appears before the Magistrate after consideration of the materials on record, then the Magistrate can discharge the accused under section 241A of the Code otherwise not.

20. Iqbal Hossain and another -Vs.- State, 27 BLC (AD) 23 [Section 173 of the Code of Criminal Procedure, 1898 & Article 103(2)(b) of the Constitution of Bangladesh, 1972]

For the purpose of holding the inquest it is neither necessary nor obligatory on the part of police to investigate into or ascertain who were the persons responsible for death. The inquest report cannot be treated as substantive evidence .....(Para 14)

Article 103(2)(b) of the Constitution granted automatic right of appeal to the Appellate Division in all death sentence cases. This is for the reason that at least three judicially trained minds need to apply their minds at the final stage of the journey of a convict on death row. Death and if not life, death or life, life and if not death, is a swinging progression of the criminal jurisprudence. The question of sentence is always a difficult, requiring as it does, proper adjustment and balancing of various considerations which weigh with a judicial mind in determinations its appropriate quantum in a given case. The main purpose of the sentence broadly stated is that the accused must realize that he has committed an act which is not only harmful to the society of which he forms integal part but is also to his own future. The sentence should neither be too lenient nor disproportionately to do so. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case .....(Para 17)

21. Phoenix Finance and Investment Limited (PFIL) -Vs.- Yeasmin Ahmed and another, 27 BLC (AD) 31 [Section 561A of the Code of Criminal Procedure, 1898]

Whether a person was in charge and was responsible for conduct of the business of the company at the relevant point of time is a question of fact and this fact cannot be entertained under section 561A of the Code. It is only possible on the part of the accused, at the time of trial, by adducing evidence that he/she was not responsible for issuing the cheque as he/she had no knowledge regarding issuance of the cheque in question

22. Zamir and others-Vs.-State, 26 BLC (AD) 252 [Section 10 of the Evidence Act, 1872]

In a case of conspiracy the subsequent behaviour of the conspirators are considered as important factors. In case of conspiracy the conspirators conspire among themselves, there remains no eye witness. They make design and prepare plan to execute the same and in furtherance of their conspiracy and common intention execute the plan.

23. Nur Mohammad-Vs.-Government and others, 15 SCOB AD, 71 [Section 5 of the Probation of Offenders Ordinance, 1960]

যখনই বিজ্ঞ বিচারক ৩২৫ ধারার অপরাধে আসামীকে দোষী সাব্যস্ত করলেন তখনই উনার উচিত ছিল "প্রবেশন অব অফেন্ডার্স অর্ডিন্যান্স, ১৯৬০" -এর ৫ ধারা বিবেচনা করা। মামলার বিষয়বস্তু থেকে প্রতীয়মান হয় যে, এই ঘটনা ঘটেছিল দুই প্রতিবেশীর মধ্যে তুচ্ছ একটা ঘটনার জের ধরে। এইসব ক্ষেত্রে আসামীকে ১(এক) বছরের জন্য জেলে না পাঠিয়ে প্রবেশনে রাখা সমীচীন ছিল। এমনকি, যেহেতু দন্ডবিধি ৩২৩ এবং ৩২৫ ধারা আপোষযোগ্য অপরাধ (Compoundable offence) এবং যেহেতু দুই পক্ষ হচ্ছে পরস্পর আত্মীয়/প্রতিবেশী কাজেই মামলাটি আপোষ মীমাংসা করা যুক্তিযুক্ত ছিল .....(প্যারা ১৬)

কোনো বিশেষ আইনের অধীনে দায়রা আদালত হিসেবে ক্ষমতাপ্রাপ্ত যেকোন আদালত বা ট্রাইব্যুনাল এবং ১ম শ্রেণীর ম্যাজিস্ট্রেটের ক্ষমতাপ্রাপ্ত যেকোন আদালত বা ট্রাইব্যুনাল-এই আইনের বিধান প্রয়োগ করতে পারবেঃ দায়রা আদালত হিসেবে ক্ষমতাপ্রাপ্ত যেকোন আদালত বা ট্রাইব্যুনাল এবং ১ম শ্রেণীর ম্যাজিস্ট্রেটের ক্ষমতাপ্রাপ্ত যেকোন আদালত বা ট্রাইব্যুনাল-এই আইনের বিধান প্রয়োগ করতে পারবে। সুতরাং বিশেষ ক্ষমতা আইন, ১৯৭৪ (Special Powers Act, 1974)-এর ধারা ২৯, সন্ত্রাস বিরোধী আইন, ১৯৯২ (Anti-Terrorism Act, 1992)-এর ধারা ১৫(১), সন্ত্রাস বিরোধী আইন, ২০০৯ (Anti-Terrorism Act, 2009)-এর ধারা ২৭(৩), নারী ও শিশু নির্যাতন (বিশেষ বিধান) আইন, ১৯৯৫-এর ধারা ২৩(১), জননিরাপত্তা (বিশেষ বিধান) আইন, ২০০০-এর ধারা ২১(১), নারী ও শিশু নির্যাতন দমন আইন, ২০০০-এর ধারা ২৫(১), ক্রিমিনাল ল এ্যামেন্ডমেন্ট এ্যাক্ট, ১৯৫৮-এর ধারা ৬(১)(ক) এবং ফরেন এক্সচেঞ্জ রেগুলেশন এ্যাক্ট, ১৯৪৭-এর ধারা ২৩ক(৩)-এ উল্লেখিত বিধান অনুসারে ক্ষেত্রমতে ট্রাইব্যুনাল অথবা আদালতসমূহ দায়রা আদালত বলে গণ্য হবে। দ্রুত বিচার আইন, ২০০২-এর ধারা ১২(২) অনুসারে ১ম শ্রেণীর ম্যাজিস্ট্রেট আদালত বলে গণ্য হবে এবং ফরেন এক্সচেঞ্জ রেগুলেশন এ্যাক্ট, ১৯৪৭-এর ধারা ২৩ক(৩) অনুসারে ক্ষেত্রবিশেষ ট্রাইব্যুনাল ১ম শ্রেণীর ম্যাজিস্ট্রেট আদালত অথবা দায়রা আদালত বলে গণ্য হবে। উপরোক্ত আলোচনার প্রেক্ষিতে দেখা যাচ্ছে যে, কোন কোন বিশেষ আইনে অপরাধের ক্ষেত্রেও "প্রবেশন অব অফেন্ডার্স অর্ডিন্যান্স, ১৯৬০" প্রয়োগ করা যাবে

.....(প্যারা ২০ এবং ২১)

24. Md. Rabiul Islam & others-Vs.-Sultan Mahmud & others, 15 SCOB AD, 96 [Section 96 and 89 of the State Acquisition and Tenancy Act, 1950]

From a conjoint reading of the above provisions of law it is divulged that sub-section 3 of Section 96 of the Act requires that an application for pre-emption must be accompanied by deposit of the entire consideration money of the property transferred as stated in the notice under section 89 together with compensation @ 10% thereof. The statutory deposit being a condition precedent to the application being entertained, its non-compliance renders the application liable to be dismissed. Therefore, direction for depositing the rest statutory compensation deposit and consideration out of time would not cure the lacuna, thus, is also illegal and without jurisdiction .....(Para 14)

Conversion of Pre-emption application filed under section 96 of the State Acquisition and Tenancy Act, 1950 to section 24 of the Non-Agricultural Tenancy Act, 1949: The pre-emption application filed under section 96 of the Act, 1950 may be converted to a pre-emption case under section 24 of the Act, 1949 because the deposit of compensation would not be a impediment in case of such conversion allowing the amendment .....(Para 15)

Conversion of application filed under section 24 of the Non-Agricultural Tenancy Act to section 96 of the State Acquisition and Tenancy Act, 1950: It further be noted that the application filed under section 24 of the Act, 1949 may be converted to an application under section 96 of the Act, 1950 if such application for conversion is filed within 120 days, i.e. within period of limitation with rest of the deposit and concerned Court allowed the such application of conversation. The application for conversation cannot be allowed after the expiry of limitation as stipulated in the section 96 of the State Acquisition and Tenancy Act .....(Para 16)

Landmark Decisions of the Supreme Court of Bangladesh in the Year of 2022

1. Bangladesh and ors Vs. Radiant Pharmaceuticals Ltd, 16 SCOB (AD) 1 [Constitution of Bangladesh, article 128 and Income Tax Ordinance, 1984 section 120 and 163 (3)]

Whether audit report has any bearing upon the subjective opinion of assessing officer.

The Audit Department has been invested with the authority to inspect the accounts of Revenue Department. The Comptroller and Auditor General is authorized to direct any of his officers to conduct audit of tax receipts or refunds under section 163 (3)(g) of the Income Tax Ordinance. The High Court Division has opined that the CAG has got no jurisdiction to check the merit or demerit of subjective opinions of the assessing officers with regard to allowing or disallowing a particular claim of the concerned assessee. This view of the High Court Division is erroneous inasmuch as if the audit report does not have any bearing in the subjective opinion of the assessing officer, the very purpose of auditing pursuant to article 128 of the constitution is to be frustrated. If no action can be taken against any irregularities detected through auditing of accounts, auditing itself becomes unnecessary. In the instant case, for example, concerned DCT has allowed financial expenses of an amount of Tk. 575,49,249/- as demanded by the assessee which was not supported by annual report etc. and the audit report has detected this irregularity. If this irregularity as detected by the audit report does not trigger any proceeding under section 120 of the Income Tax Ordinance, 1984, the power conferred to the CAG under section 163(3)(g) of the same Ordinance becomes fruitless.

2. Bangladesh and another Vs. Sayed Mahabubul Karim, 16 SCOB (AD) 46 [Rule 34, 1st Part of the Bangladesh Service Rules]

It is unambiguous from the phraseology of the rule 34 of the BSR that when continuous absence from work exceeds five years, be the absence with or without leave; the service of a Government servant will come to an end. Yet, the Government and only the Government may make a diverse conclusion upon taking into consideration any special state of affairs. Consequently, this mechanical ceasing of the service is subject to the ability of the Government to take a different decision in the light of out of the ordinary situation.

3. Abdur Rashid being dead his heirs Md Hossain & ors. Vs. Nurul Amin & ors, 16 SCOB (AD) 77 [Section 96 of the State Acquisition and Tenancy Act, 1950, Section 115 of the Evidence Act, 1872]

We have no hesitation to hold that even after subsequent transfer by the stranger pre-emptee to another cosharer of the holding, the pre-emptory right of a co-sharer pre-emptor will not be defeated as because the subsequent transfer is subject to the right available against the original transfer and the subsequent transferee would be impleaded as party in the pre-emption proceeding and he would be entitled to get the consideration and compensation money as deposited by the pre-emptor.

4. Commissioner, Customs, Excise and VAT Com. & ors. Vs. Perfect Tobacco Co. Ltd, 16 SCOB (AD) 84 [Section 42(1) (Ka), 42(2) (Ka) of the VAT Act read with article 102 of the Constitution]

Any person aggrieved by the decision or order passed by the Commissioner, Additional Commissioner or any VAT Official lower in the rank of the Commissioner or Additional Commissioner can prefer appeal to the forum prescribed in the section. In the instant case the writ-petitioner impugned adjudication order dated 15.08.2007 passed by the writ-respondent no.2 Assistant Commissioner, Customs, Excise and VAT Division, Kushtia which is an appealable order under section 42(1)(Ka) of the VAT Act and section 42(2)(Ka) mandates that 10% of the demanded VAT is to be deposited at the time of filing of the appeal. When there is a statutory provision to avail the forum of appeal against an adjudication order passed by the concern VAT Official then the judicial review under Article 102(2) of the constitution bypassing the appellate forum created under the law is not maintainable.

5. Minaz Ahmed and another Vs. Arif Motahar and others, 16 SCOB (AD) 89 [Money Laundering Protirodh Ain, 2012; Anti-Corruption Commission Act, 2004; Money Laundering Protirodh Bidhimala, 2019; Section 497, 498 of the Code of Criminal Procedure, 1898]

Jurisdiction of Special Judge in cases initiated by any agency other than the Anti-corruption Commission under the Money Laundering Protirodh Ain:

The Special Judge appointed under the provision of Act of 1958 has no jurisdiction to deal with a case initiated under Money Laundering Protirodh Ain by any other investigation agency other than the case initiated by the Commission before taking cognizance. Jurisdiction of the Magistrate in cases initiated by any agency other than the Anti-corruption Commission under the Money Laundering Protirodh Ain.

Thus, before submitting report as per provision of section 173 of the Code of Criminal Procedure and taking cognizance of the offence by a Special Judge appointed under the Act of 1958 i.e. at the pre-trial stage an accused has every right to move all kinds of applications including the application for bail before the Magistrate concerned where the case is pending and record lies. And as per provision of section 497 of the Code of Criminal Procedure the Magistrate concerned has got the jurisdiction to deal with the matter in accordance with law. Section 497 and 498 of the Code of Criminal Procedure: In the absence of any express or implied prohibition in any other special Law or Rule, the Magistrate concerned may entertain, deal with and dispose of any application for bail of an accused under section 497 of the Code of Criminal Procedure. In case of rejection of his application for bail he may move before the Court of Sessions by filing a Criminal Miscellaneous Case under section 498 and thereafter in case of failure before the Court of Sessions, he can move under section 498 of the aforesaid Code for bail before the High Court Division.

6. DG, Health Directorate & ors Vs. Dr. Md. Tajul Islam & ors, 16 SCOB (AD) 100 [Legitimate Expectation; Recruitment; Government policy; vested right]

Mere participation in the written and viva voce examination, ipso facto, does not create any vested right in favour of the writ petitioners respondents to be appointed. The writ petitioners-respondents did not have acquired any legal right to be appointed in HPSP project and now they cannot claim to be appointed in new project i.e. Alternative Medical Care (AMC) Operational Plan (OP) as of right without participating in recruitment process. The writ petitioners-respondents participated in the examination for appointment under HPSP project in the year 2003 and having regard to the fact that the said appointment process was postponed and cancelled and on the plea of their participation in the earlier written and viva examination, no legal and vested right has been created in favour of the writ petitioners-respondents to be appointed to the posts as allegedly vacant in the new project. Mere participation in the written and viva voce examination, ipso facto, does not create any vested right in favour of the writ petitioners-respondents to be appointed automatically in the newly created posts in subsequent project.

7. Eriko Nakano Vs. Bangladesh and others, 16 SCOB (AD) 107 [Custody of minor children; Article 7, 12, 20 and 21 of the Convention on the Rights of Child; Guardians and Wards Act, 1890; best interest of the child; enforceability of provisions of international instruments]

The Court must look for the best interests of the minors: The Court must look for the best interests of the minors and the petitioner in the present case being the mother of these two minor daughters left each and every effort for their best interest. It was decided in the case Abu Bakar Siddique vs SMA Bakar reported in 38 DLR(AD)106 that "welfare of the child would be best served if his custody is given to a person who is entitled to such custody." It is the Family Court who has the jurisdiction to settle the question of custody of a minor: Considering the aforesaid facts and circumstances we are of the view that removal of the detainees from the custody of their mother petitioner is without lawful authority and they are being held in the custody of respondent No.5 in an unlawful manner and the High Court Division passed the judgment beyond the scope of law which required to be interfered. In this case only Family Court has the jurisdiction to settle the question of custody of a minor. The Family Court will look into the cases referred by the parties and come to a finding in whose custody the welfare of the detainees will be better protected.

8. Secretary, Posts and Tele-communications Division, Ministry of posts & another –Vs- Shudangshu Shekhar Bhadra & others, 74 DLR (AD) 222 [Article 111 of the Constitution of Bangladesh, 1972]

Binding effect of Supreme Court Judgment- If any judgment pronounced by the Appellate Division, the High Court Division is not competent to say the judgment is per incuriam. Primarily the High Court Division must follow the judgment in toto, however, in such a situation the High Court Division may draw attention of the Honourable Chief Justice regarding the matter. Even if any judgment pronounced by the High Court Division, the subordinate Courts have no jurisdiction to raise any question regarding the legality of the judgment on the point of per incuriam.

.....(Para 23)

Per incuriam- A decision can be said generally to be given per incuriam when the Court had acted in ignorance of a previous decision of its own or when the High Court Division had acted in ignorance of a decision of the Appellate Division. Nothing could be shown that the Appellate Division in deciding the said case had overlooked any of its earlier decision on the point. So, it was not open to the High Court Division to describe it as one given "per incuriam". Even if it were so, it could not have been ignored by the High Court Division in view of Article 111 of the Constitution which embodies, as a rule of law, the doctrine of precedent.

.....(Para 20)

9. State –Vs- Badal Kumar Paul, 74 DLR (AD) 199 [Section 19(1) of the Narcotics Control Act, 1990]

Since the existence of codeine phosphate makes phensedyl a narcotic combination, the possession of or carrying of phensedyl is thus a punishable offence under section 19(1) Serial 3 of the Act.

10. Gaisuddin Bhuiyan & others –Vs- Secretary, Security Services Division, Ministry of Home Affairs, Bangladesh Secretariat, Dhaka, 74 DLR (AD) 231 [Article 102 (2) of the Constitution of Bangladesh, 1972]

It is settled that though the appointing authority has right to amend/alter the Service Rules to suit the need of time but not to the detriment to the rights or privileges that existed at the relevant time when an employee of such appointing authority entered into it's service.

.....(Para 19)

11. Secretary, Bangladesh Bar Council, Dhaka –Vs- Maksuda Parvin & others, 74 DLR (AD) 207 [Articles 102 and 103 of the Constitution of Bangladesh, 1972]

It is a test case by the Prime University to cover their wrong done and legalize other more than 1,300 law students who completed LL.B (pass) course from the University in violation of the undertaking by the university. This cannot be allowed.

.....(Para 16)

12. Dr. Zubaida Rahman, wife of Tarique Rahman vs State & another, 74 DLR (AD) 185 [Part VI & Article 7 of the Constitution of Bangladesh, 1972, Section 561A of the Code of Criminal Procedure, 1898]

The judiciary must stand tall and unbend at all circumstances, even in adverse situation. The judiciary should not create a precedent which cannot be applicable for all. Each and all of the citizens are entitled to get equal treatment from the Court of justice. There is no high or low before the Court of law.

.....(Para 23)

Before issuance of the Rule it was incumbent upon the High Court Division to look into the matter that the proceedings which is challenged is not initiated yet because no cognizance of offence has been taken by the appropriate Court against the petitioner and even the charge-sheet was not produced before the concerned Court.

.....(Para 19)

13. Rajdhani Unnayan Kartipakkha (RAJUK) & another –Vs- Dr. Fofail Hoque & another, 27 BLC (AD) 91 [Article 102(2)(a)(i) of the Constitution of Bangladesh, 1972]

Writ of mandamus- When the legal and vested right has not been created in favour of a person, the question of legitimate expectation of such person cannot be raised and no mandamus can be issued.

RAJUK cancelled the plot of the writ-petitioner on the ground of irregularities and illegalities as found in the allotment process. The RAJUK did not enter into any agreement with him as well as did not receive any installment money in connection with the alleged allotted plot and, as such, no legal and vested right has been created in favour of the writ-petitioner.

..... (Para 20, 21)

14. Government of the People's Republic of Bangladesh, represented by the Secretary, Ministry of Finance, Internal Resources Division & others –Vs- Moazzam Hossain, Proprietor of M/s. Abdullah Traders, 27 BLC (AD) 105 [Section 83A(2) of Customs Act (IV of 1969)]

Section 83A(2) of the Act provides that if the demand has the effect of imposing a fresh liability or enhancing an existing liability, a demand notice in writing shall be given by the officer of customs to the person liable for the payment of additional duty and section 83A(3) mandates that unless otherwise specified in the Act, the due date for payment against the demand notice shall be 30 (thirty) working days from the date of issuance of such a demand notice by the officer of customs.

.....(Para 19)

15. Chairman, Court of Settlement & another –Vs- Moulavi Syed Karim 27 BLC (AD) 122 [Article 103 of the Constitution of Bangladesh, 1972]

The issue is being raised, for the first time, at the time of hearing of the case before us which, according to us, cannot be permitted to be raised for the first time for the simple reason that the issue that is being urged now is not only a question of law but is a mixed question of law and facts. The facts were required to be urged evidentially before the courts below. Unless such a factual foundation is available it is not possible to decide such a mixed question of law and facts. Therefore, such a mixed question of law and facts should not be allowed to be raised at the time of final hearing of appeal before this Division.

..... (Para 16)

16. Government of Bangladesh represented by the Secretary, Ministry of Finance & others –Vs- Ocean Containers Limited represented by its Managing Director, 27 BLC (AD) 142 [Section 46(2)(f) of Income Tax Ordinance (xxxvI of 1984)]

'Container terminal' in question was not within the purview of physical infrastructure facility when the petitioner company filed application seeking tax exemption and the NBR justly and legally rejected the application for exemption and also correctly rejected the review application seeking review of earlier order since there left no scope to review of that application by the NBR.

.....(Para 19]

It is cardinal principle of construction that every statute is prima facie prospective unless it is expressly or necessary implication made to have a retrospective operation.

..... (Para 17)

17 Mohammad Ali @ Sakil –Vs- State, 27 BLC (AD) 184 [Sections 35A, 374 and 376 of the Code of Criminal Procedure (v of 1898)]

Justice would be made if the sentence of death is commuted into imprisonment for life as the appellant is in pang of death since pronouncement of the trial Court and subsequent affirmation by the High Court Division and, as such, the sentence of death is commuted into imprisonment for life. The appellant will get the benefit of section 35A of the Code in calculation of his sentence.

18. Anti-Corruption Commission, represented by its Chairman –Vs- Dr. Khandaker Mosharraf Hossain & another, 74 DLR (AD) 141 [Section 540 of the Code of Criminal Procedure, 1898]

Section 540 of the Code can apply only to examine or recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

.....(Para 21)

LANDMARK DECISIONS OF APPELLATE DIVISION OF THE SUPREME COURT OF BANGLADESH IN THE YEAR OF 2023

1. Jotilal Chowdhury Vs Suruchi Bala Singha, XX ADC 1

A deity, established for 'puja' or other religious purpose being a jurist person, and being a perpetual minor cannot be a 'Benamder' and any transaction detrimental to the interest of a deity is void, illegal and non-est in the eye of law. In the instant case by virtue of the deed, exhibit-4 right, title and interest has been conferred/vested upon the deities. Once property vests or confers upon the deity by dedication, gift or otherwise, the deity acquires its right, title and interest.

It is well settled that a 'Nadabi-Patra' or 'Muktinama' being merely a deed of disclaimer disclaiming any interest in the property transferred by an earlier sale deed is not a deed of transfer.

2. Government of Bangladesh Vs Sinku Akramuzzaman, XX ADC 78

According to the Ordinance, 1985 the government cannot enlist any property as abandoned after 31st October, 1988, but the disputed property has been enlisted as abandoned on 18.11.2007.

As per Article 2(1) of the P.O. No.16 of 1972 abandoned property denotes property owned by a person who is either (i) not present in Bangladesh, or (ii) whose whereabouts are not known, or (iii) who has ceased to occupy, supervise or man- age in person his property.

3. Md. Khokon Vs The State, XX ADC 144

In general terms, it may be stated that the length of period spent by a convict in the condemned cell is not necessarily a ground for commutation of the sentence of death. However, where the period spent in the condemned cell is not due to any fault of the convict and where the period spent there inordinately long, it may be considered as an extenuating ground sufficient for commutation of sentence of death.

4. Milon @ Md Milon Vs State, 75 DLR (AD) 164

When more than one person are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other of such persons as well as against the person who makes such confession. .

5. Barrister Muhammad Jamiruddin Sircar Vs State, 75 DLR (AD) 99

The parliament secretariat will be responsible only to the Parliament through the Controller and Auditor-General over the matter of expenditure of the financial allocation in the yearly budget and nobody else can raise any question as to the use of such budget. But in the cases in hand, those provisions of the Act, will not give any protection to the appellant since the Anti- Corruption Commission brought allegation against the appellant and other accused persons as to the mode of approval of medical bills in doing which the Speaker was not authorized to approve without the sanction of the Prime Minister. Neither the ACC nor any authority does have power to raise question about the authority of the Speaker in approving bills.

6. Hazrat Ali Vs State, represented by the Deputy Commissioner, 75 DLR (AD) 40

Conviction of an accused can safely be based on the solitary evidence of an eye- witness, if evidence is found full, complete and self-contained and further, the testimony of the solitary eye-witness could not be shaken in any manner by the defence in cross-examination.

7. Dr. Miah Md Mohiuddin vs State, 75 DLR (AD) 8

The act of recording a confession is a very solemn act and section 164 of the Code lays down certain precautionary rules to be followed by the Magistrate recording a confession to ensure the voluntariness of the confession. In such a case, the accused being placed in a situation free from the influence of the policeis expected to speak out the truth being remorseful of what he has committed.

A confession can be acted upon if that passes two tests in the assessment of the court. The first test is its voluntariness. If a confessional statement fails to pass the first test, the second test is immaterial. If he does not disclose his complicity in an alleged crime voluntarily, court cannot take into consideration the confessional statement so recorded, no matter how truthful an accused is. (40)

8. Manager, Rupali Bank Limited Vs Md. Abdur Rahman and others, XX ADC 406

Rupali Bank Limited is a public limited company and it has a specific department to appoint the competent officials. All the officers and labour of the bank got appointment after complying the standard rules of appointment through a competitive written and viva voce examination and the proper authority to appoint the officials is the board of the bank or any other authority duly authorized by the board in that pur. pose. It is also settled that five conditions are to be satisfied in case of gelling appointment with the bank which includes advertisement of vacancies, written examination, viva voce examination, appointment letter and joining letter. But the writ petitioners-respondents No.1 and 2 could not produce any appointment letter, joining letter and any approval order from the competent authority appointing them in the branch in any of the permanent or temporary post. In a writ petition court cannot pass direction on the basis of imagination of the existence of some documents.

9. Md. Ali Akram Hossain Vs Md. Mostafizur Rahman and others, XX ADC 451

In order to pass a decree in a suit for specific performance of contract following matters should be looked into: (i) the express terms of the agreement; (ii) nature of the property; (iii) surrounding circumstances; (iv) intention of the parties and (v) reciprocal promise of executing, sale deed. There is no averment in the pleading as to the offer and acceptance or refusal to accept the consideration which are the criteria to get a decree for specific performance of con- tract, the High Court Division most illegally treated the alleged agreement as an agreement for sale and, thereby, erroneously set aside the judgment and decree of the courts of facts below. This was not a fit case in which specific per- formance of contract should be enforced by the Court.

10. Md Shamim Vs The State, XX ADC 489

It is to be observed that a dying declaration, although a piece of substantive evidence has always been viewed with some degree of caution as the matter is no liable, to cross-examination. A dying declaration, however, otherwise stands on the same footing as any other piece of evidence and has to be judged in the light of surrounding circumstances and common human experience. When there is a record of such statement of the deceased the court has to satisfy itself, in the first place, as to the genuineness of the same keeping in view all the evidence and circumstances in which the statement of the deceased was said to have been recorded.

11. Shishubar Dhali Vs Chitta Ranjan Mondol, 75 DLR (AD), 125 SCOB

A Hindu male governed by the Bengal School of Hindu Law, dies leaving a widow and a brother. On A's death, the widow succeeds as his heir. The widow then dies leaving a daughter's daughter. The widow's stridhana will pass to the daughter's daughter as her stridhana heir, but the property inherited by her from her husband A will pass to the next heir of her husband, namely his brother.

12. Azizul Hague Sarker Vs Md. Wazed Ali, XX ADC 568

The leasehold right being admittedly heritable and transferable, the Government cannot cancel the allot- ment order without cancelling the lease deed as the petitioner's right in the land finally accrued on the lease deed.

The ADC (Revenue) had no authority to cancel the registered settlement deed duly executed by the Deputy Commissioner.

13. Terab Ali Vs Syed Ullah, XX ADC 353

The ex-parte decree passed in Title Suit No. 22 of 1983 on 15.04.1989 and the execution case has been filed on 20.10.1993 which is beyond the period of 3 years as codified by the article 182 of limitation Act, 1908.

As per Article 182 of the Limitation Act, 1908 the very first execution case must be filed within 03 (three) years of the date of decree. And admittedly as well as documentarily the Title Execution case in question bearing no. 03 of 1993 was filed on 20.10.1993 where as the original Title Suit no. 22 of 1989 was decree ex-parte on 15.04.1989 which makes the Title Execution case no. 03 of 1993 hopelessly barred by limitations for at least 01 and half years. We surprising observed that all the courts below missed the clear and unambiguous provisions of law.

14. Mostafa Shahriar Vs Mostafa Ahmed, XX ADC 256

The Vested Property Authority issued notice on 31.08.1978 in VP Case No. 22 of 1978-79 claiming the entire land as vested property, but, after production of the necessary papers by the appel- lants that notice withdrawn. However, the Court of Appeal did not consider these aspects of the case rather, the High Court Division also committed error in failing to find out the said error of the Court of appeal below and there- by committed error in affirming the decision of the Court of appeals.

15. Mukhtar Khan Vs Government of Bangladesh, XX ADC 584

The suit land has been recorded in S.A Khatian No. 19 in the name of Gyanda Sundari. But subsequently the suit land was taken over by the Government as per section 92 of the State Acquisition and Tenancy Act. Since, the plaintiff has completely failed to prove that Gyanda Sundari was living in this country around 1972-73, it can be assumed that Gynda Sundary, wife of Purna Chandra Chowdhury left this country.

Every entry in a record-of-rights pre- pared or revised under section 144 shall be evidence of the matter referred to in such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect.

16. IDRA Vs Ms. Shaila Akhter, XX ADC 561

Mere wording of 'temporary' used in the appointment letter cannot be the basis for categorizing the employee as temporary appointee in the absence of any fraction period or certain period mentioned in the appointment letter itself. The writ petitioner [respondent No.01] was appointed initially on 01.08.2011 and subsequently after considering her good performance by office order dated 04.01.2012 her monthly salary has been increased to Tk. 12000/-with effect from 01:01.2012. It further appears that she got appointed in the post of Junior Officer on temporary basis. But the appointment letter of the writ-petition- er [respondent No. 01] does not contain any fraction period or certain period for which she was appointed and as such she could not be termed as temporary appointee.

17.The Registrar, BMOC Vs Shah Md. Arman, XX ADC 248

It is a well established principle that fraud vitiates everything. Legal maxim Nullus commodum capere potest de injuria sua propria' has a clear mandate of law that, a person who by manipulation of a process frustrates the legal rights of others, should not be permitted to take advantage of his wrong or manipulations. Fraud and justice never dwell together. (Franc et jus nun- quam cohabitant) is a pristine maxim which has never lost its temper over all these centuries. No judgment of Court, no order of a Minister can be allowed to stand if it has been obtained by fraud, for, fraud unravels everything.

18. Mrigangka Mohan Dhali & ors Vs Chitta Ranjan Mondol & ors., 18 SCOB AD 20

In case of Stridhan property, it reverts back to the nearest heir of the female who is the owner of that er property: The guiding 'Principle of Law of Inheritance' under the Dayabhaga School of Law, which prevails in Bangladesh, is the doctrine of religious efficacy. Religious fefficacy means capacity to confer special benefit upon the deceased person. Succession is the mode of devolution of property under the Dayabhaga system. The general Rule of inheritance is that once a property is vested upon any one, it rt will not be divested. But in case of Hindu woman, getting limited ownership in the property is contradictory to this e general Rule as the property will revert back to the heir of the owner. Only in case of Stridhan property, it reverts back to the nearest heir of the female who is the owner of that y property. It is to be noted that succession of the 'Stridhan property' is held absolutely by a female.

When a daughter inherits Stridhan of her mother, she takes it absolutely like a son: When a daughter

inherits Stridhan of her mother, she takes it absolutely like a son because son and daughter inherit "EQUALLY" and not even - a single line of "The Dayabhaga" suggests it to become her "widow's estate" or anything like that.

19. Md. Zahangir Alam & ors Vs The State, 18 SCOB AD 45

Article 105 of the Constitution and Rule 1 of Order XXVI of the Supreme Court of Bangladesh (Appellate Division) Rules, 1988: The core question for consideration is whether there is error apparent on the face of the record which calls for interference of the impugned judgment. It is an established jurisprudence that a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only against patent error of law. Where without any elaborate argument one could point to the error and say that here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions to be entertained about it, a clear case of error apparent on the face of the record would be made out. It is only a clerical mistake or mistake apparent on the face of the record that can be corrected but does not include the correction of any erroneous view of law taken by the Court.

20. Bangladesh & ors Vs Sk. Md. Abdullah Faruque & ors., 18 SCOB AD 54

Article 102 of the Constitution and Chapter XIA of the Supreme Court (High Court Division) Rules, 1973: The High Court Division erred in law in travelling beyond the scope/terms of the Rules Nisi: The person who wants to invoke article 102 must be an aggrieved person and must specify the relief in his prayers. Chapter XIA of the Supreme Court (High Court Division) Rules, deals with preparing and filing of writ petition under article 102 of the Constitution. It provides that the aggrieved person must specifically set out the relief sought for. So, the writ petitioner must have specific claim in the form of prayer against such persons who are respondents, following which the Court can grant relief, if favourable, in accordance with law. In the present cases, the High Court Division has delivered the impugned judgment and order basing on the "জাতীয়করনকৃত কলেজ শিক্ষক ও অশিক্ষক কর্মচারী আত্মীকরন বিধিমালা-২০১৮" by which the earlier Rules of 2000 has been repealed and thereby directed the writ respondent-leave petitioner herein to absorb the writ petitioners-respondents herein as Lecturers in their concerned Government Colleges despite of the fact that the writ petitioners did not make any such claim in the form of prayer in the writ petition asking absorption under the aforesaid absorption Rules of 2018 nor the Rules Nisi were issued at that effect. As such, the High Court Division erred in law in travelling beyond the scope/terms of the Rules Nisi in both the writ petitions in giving relief to the writ petitioners while passing the impugned judgment and order.

21. State Vs Nurul Amin Baitha, 75 DLR (AD) 187

The appellate Court has wide power to alter and amend the charges which may have been erroneously framed earlier.

Joint trial of different offences under different enactments does not vitiate proceedings in the absence of prejudice to the accused, particularly when the special enactment authorizes the Court to try different offences jointly where a charge is framed for one offence but offence committed is found to be some other than the one charged, provided, the same facts can sustain a charge for the latter offence, the accused can be convicted for such an offence.

The High Court Division as an appellate Court has the jurisdiction to convert conviction under section 11(Ka)/30 of the Ain to one under section 302/34 of the Penal Code as appeal is the continuation of an original case. An appellate Court has the same power as that of the trial Court i.e. the tribunal and therefore, as an appellate Court the High Court Division is competent to convert the conviction to secure the ends of justice.

22. Government of Bangladesh Vs Syed Fazle Elahi Obhi, 75 DLR (AD) 93

A Judicial Officer has every right to pass any order within the ambit of law and if, anyone is aggrieved by the same he has legal remedy before the higher Court in appropriate forum. But, the manner the writ-petitioner brought unfounded allegation against the concerned Magistrate, is highly objectionable.

During investigation of a case there is no scope to come to a definite conclusion that an accused is to be harassed and humiliated on mere apprehension and surmises.

23. State Vs Omit Hasan @ Azmir, 75 DLR (AD) 113

An order of stay takes effect from the moment it is passed and the knowledge of the court or others concerned is immaterial. The information of the existence of such a prohibiting order must be communicated in any way to the courts below for the purpose of proceedings to be taken against any person for contempt of the authority of the higher Court. But the operation of the order is not in any way postponed till it has been communicated to the subordinate Court or the party intended to be affected by it.

In absence of any solid-concrete evidence as to that the High Court Division passed the impugned order with conscious defiance of the higher courts our considered view is that the order was passed in ignorance of the order of stay and it may be said that there was no willful disobedience of the order. It is highly expected that courts below including the High Court Division should maintain cautiousness in the matters.

24. Court of Settlement & Anr Vs Moulavi Syed Karim, 31 BLT (AD) 31

The issue is being raised, for the first time, at the time of hearing of the case before us which, according to us, cannot be permitted to be raised for the first time for the simple reason that the issue that is being urged now is not only a question of law but is a mixed question of law and facts. The said facts were required to be urged evidentially before the courts below. Unless such a factual foundation is available it is not possible to decide such a mixed question of law and facts. Therefore, such a mixed question of law and facts should not be allowed to be raised at the time of final hearing of appeal before this Division.

25. Commissioner of Customs, VAT & Excise & Ors. Vs Abul Khair Steel Mills LTD, 31 BLT (AD) 152

The Spirit of law is that the date for the purpose of calculating the value of the goods and the date for determining the rate of duty should be the same. Therefore, we have no hesitation to hold that there is no justification for taking one date for one purpose and another date for another purpose. - the principle enunciated in the cited case there seems no plausible way to conclude that Section 79 is referring to Ex-Bond document and consequently it is clear that the value of goods and the rate of duty shall be the one prevailing at the time of presenting the In- Bond Bill of Entry and not the Ex-Bond Bill of Entry document and once the In- Bond Bill of Entry is submitted any subsequent development in case of determination of value or any redetermination of rate of duty or taxes, shall not affect the value of the concern goods or the rate of duty for the purpose of payment of duties and charges.

26. Khandakar Nuria Islam Vs Deputy Commissioner, Panchagarh, 20 ADC 169

It is a cardinal principle of administration of justice that no result of any judicial proceeding should be allowed to receive judicial approval from any Court of law whenever it is obtained by practicing fraud upon the court; reason being fraud demolishes the very foundation of sanctity of such judicial proceeding. It is also well established principle of law that fraud vitiates all judicial proceedings. Thus contravention of the provision of law cannot be a valid ground for allowing an order obtained by fraud to stand. When the trial Court itself on consideration of the materials on record was satisfied that a fraud had been committed in obtaining the ex parte decree it was the duty of the trial Court to set aside the ex parte decree. The failure of the trial Court in the performance of its legal obligations ought not to have been maintained by the High Court Division in affirming the finding of the trial Court.

27. Kanchon Ali Khan Vs Ali Akbar Khan, 20 ADC 231

The suit for partition is incompetent if all the co-sharers are not included as parties to the suit, as no effective decree can be passed in the absence of any one of them. It is true that under Order-I, Rule-9 of the Code of Civil Procedure, 1908, no suit shall be defeated by reason of miss-joinder and non-joinder of parties but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit is bound to be fatal.

The general Rule that a partition suit should embrace all the joint properties of the parties concerned is indeed a Rule of convenience. If properties are left out in a partition suit it brooks further litigation. It is true that this Rule is relaxable. But there are specific situations calling for relaxation. They are generally (a) where different portions of the property lie in different jurisdictions, or (b) when some portion of the property is at the time incapable of partition, or (c) when the property from its nature is importable, or (d) When property is held jointly with strangers who cannot be joined as parties to a general suit for partition, or (e) where cotenants, by mutual agreement, decide to make partition of a part of the joint property retaining the rest in common.

The finding of fact whether concurrent or not, arrived at by the lower appellate court is bindings on the High Court, both as second appellate court and a revisional court, except in certain well-defined exceptional circumstances.

28. M.A. Majid Vs Shahab Uddin, 20 ADC 524

The right of pre-emption can be waived or relinquished at an earlier date than on date of actual completion of the sale under the law. This position is deduced on the concept that although the right of pre-emption becomes enforceable only when there is a sale, but the right exists antecedently to the sale inasmuch as such such right is indispensable for avoiding inconvenience and disturbances arising out of introduction of a stranger into the land.

It is true, the right of pre-emption accrues after transfer of the land and statutory right of pre-emption cannot be taken away by mere verbal assurance of the person having such right unless other facts and circumstances clearly make out a case of acquiescence or waiver. 'Acquiescence' arises when a person, knowing that he is entitled to enforce some right, neglects to do so for such a long time that the other person opposing such right may fairly infer that he has waived or abandoned it. It is failure to object to certain transaction or Act. "Waiver" means simply abandonment of any claim or right.

29. Government of Bangladesh Vs Md. Abdul Jalil, 20 ADC 557

In view of the facts and circumstances of the case, it appears that the delay caused in filing the revisional application was due to the exhaustion of the official formalities and as such, the same is beyond the control of the defendant petitioners and moreover, the aforesaid delay of 403 days is not an inordinate one and as such, if the same is not condoned the defendant leave petitioners shall be led to irreparable loss and injury.

30. Md. Zahangir Vs The State, 20 ADC 655

In Order that an error may be a ground for review, it is necessary that it must be one which is apparent on the face of the record, that is, it must be so manifest, so clear that no Court could permit such an error to remain on the record. It may be an error of fact or of Law, but it must be an error which is self-evident and floating on the surface, and does not require any elaborate discussion or process of ratiocination. The contention that the exposition of the Law is incorrect or erroneous, or that the Court has gone wrong in the application of the Law to the facts of the particular case: or that erroneous inference have been drawn as a result of appraisal or appreciation of evidence, does not, constitute a valid ground for review. However, an Order based on an erroneous assumption of material fact, or without adverting to a provision of Law, or a departure from an undisputed construction of the Law and the Constitution may amount to an error apparent on the face of the record. At the same time if the judgment under review or a finding contained therein, although suffering from an erroneous assumption of facts, is sustainable on other grounds available on the record then although the error may be apparent on the face of the record, it would not justify a review of the judgment or the finding in question. In other words, the error must not only be apparent, but must also have a material bearing on the fate of the case. Errors of inconsequential import do not call for review.

Landmark Decisions of the Supreme Court of Bangladesh in 2024

1. Mir Forjet Ali Vs Rajab Ali Matubbar and others, Civil Revision Number 1615 of 1993

Section 25(a) of the Specific Relief Act disqualifies a person from specific performance of contract, who knowingly himself not to have any title to a property, contracts to sell it. However, such contract makes him liable for payment of damages. Under exceptional circumstances, a third party's claim of physical possession and prima-facie title can be adjudicated on merit in a suit for specific performance of contract, where he is already made a party and claims independent title and physical possession over the subject matter of the contract. This will help avoid multiplicity of litigation and future complications.

2. Annaullah Vs Commissioner of Customs, Customs House, Bandar, Chattogram & Others, Civil Revision No. 658 of 2002

As far as jurisdiction of the Civil Court to entertain any appeal against an order passed by a Custom Officer is concerned, section 196M of the Customs Act, 1969 bars the jurisdiction. No Appeal shall lie to any civil court by any person aggrieved by any decision or order passed by an officer of customs before appealing to and getting decision or order thereon from the Commissioner (Appeal) or the Appellate Tribunal, as the case may be.

3. Major General (Retd.) Md. Sarwar Hossain and another Vs Bangladesh Securities and Exchange Commission (BSEC), Dhaka and Others, WP No. 3911, 3912 & 4644 of 2023

Independent Directors being appointed by the Board of Directors of the company listed with the respective stock exchange in Bangladesh are to maintain their independent entity and impartiality. Except receipt of remuneration for the services they have rendered, they do not have any connection whatsoever with the sponsor, director or nominated directors, any associates or sister-concern. Nor can they be shareholders or directors of the said company or have any interest whatsoever in the company whether pecuniary or otherwise. Independent directorsis appointed with a view to smooth running of the company, ensure good corporate governance and also to protect the greater interest of the investors. Securities and Exchange Commission has a right to exercise its supervisory power under Section 20A of Securities and Exchange Ordinance,1969 to issue any directive for restructure of the Board of Directors of the Company so far as Independent and nominee Directors are concerned.

4. Bangladesh Fisheries Development Corporation (BFDC) Vs The Judge, Artha Rin Adalat No. 1 Chattogram and others, WP No 13933 of 2018

The location of the mortgaged property is immaterial for any executing Artha Rin Adalat which passes any decree to proceed with the execution case. It can either execute the case itself or it can send the decree for execution to the court having the territorial jurisdiction upon the mortgaged property. It doesn't amount to illegality when, upon passing a decree, an Artha Rin Adalat disposes the mortgaged property situated beyond its territory. It may be appreciated to transfer the execution case to the court where the property is situated. But if the case passes the initial stage and sufficient time has elapsed after disposal of the property and a certificate is issued under section 33(7) of the Act, 2003, there is not merit to interfere.

5. Young Optics (BD) Ltd. Vs The Executive Chairman, Bangladesh Export Processing Zones Authority (BEPZA) and Others, WP No. 8484 of 2023

Just because the lessor is a statutory organization, the lessee doesn't incur any right to invoke the writ jurisdiction for any dispute pertaining to the lease agreement. The lease agreement remains to be a pure commercial contract and hence writ jurisdiction cannot be agitated. When the rights and obligations of the parties to any contract is regulated by the terms and conditions of the agreement itself, no vested rights or interest over the properties in question can be claimed ignoring those terms and conditions.

6. Ohidur Rahman and another Vs Md. Abdur Rab Khan (Khoka) and others, Civil Revision no. 4274 of 2023

An established precedent handed down by past Judges that right of pre-emption accrues on the date of registration of deed of sale, when registration is compulsory, it means that from the date of entering into volume, signed, sealed and certificated by the registering officer under section 60 of the Registration Act. Nowadays, it takes longer time even up to 5 years to get a document registered under section 60 after presentation. Just when the pre-emptee is secured in his belief that he can relax with his ownership and possession of purchased land arrives the notice of a pre-emption case a rude awakening. Surely, the pre-emptor cannot be given such a long rope with which to hang the pre-emptee, after such a lapse of time. Law of the pre-emption in our country now has become redundant and for this law, number of cases increased and bona fide purchasers of the property have been suffering hardship for uncertain period. Therefore, the law of the preemption is required to be repealed or amended drastically to protect the interest of the bonafide purchasers from the repression of pre-emption cases, so that volume of cases in this particular area will be reduced and the purchasers can be relaxed with their ownership and possession of the purchase land.

7. Bimal Mistri and others Vs Anil Mistri, Civil Revision No. 2382 of 2005

In view of the provisions of Hindu Law, non-performance of funeral ceremonies of a deceased doesn't exclude a person from inheriting the property left by the deceased. It is well settled position of Hind law that inheritance is never in abeyance. On the death of a Hindu, the person who is then the nearest heir becomes entitled at once to the property left by him. The right of succession vests in him immediately on the death of the owner of the property. It cannot under any circumstances remain in abeyance in exception of the birth of a preferable heir. Once the estate of the Hindu has vested in a person who is the nearest heir at the time of his death, it cannot be divested except either by the birth of a preferable heir such as son or a daughter who was conceived at the time of his death.

8. Md. Selim Khan Vs The State, Criminal Miscellaneous Case no. 1656 of 2024

Defamatory statements against any revered religious figure, particularly against Prophet Muhammad (SM) holds no necessity. Libelous speeches against him amounts to preposterous suggestion aimed to instigate communal violence and disharmony. Parliament may consider to address such audacious act with capital punishment or life imprisonment. Bangladesh is a country where people pertaining to all religion have been living for centuries. It is incumbent for everyone to ensure that we live here with honor and comfort and in peace and security. Any inciteful comments that may dishearten the feelings of any particular community must not be given any room in our society, otherwise it will create anarchy and destroy our social fabrics. Such offences should be dealt with non-bailable provision.

9. Government of the People's Republic of Bangladesh Vs Belal Uddin, Civil Appeal No. 375 of 2015

It is absolutely incumbent upon the claimant who claims the property to be illegally included in the gazette to prove the said property is not an abandoned property. The fact of proving that the property is not an abandoned one and not vested in the government is totally on the person who challenges the same to be not an abandoned property and intends to take such property out of the list of the abandoned property published in the official Gazette.

10. Dr. Shahdeen Malik and another Vs Bangladesh, represented by the Secretary, Legislative Drafting Division, Ministry of Law, Justice and Parliamentary Affairs and others, Writ Petition No. 10378 of 2024

Section 6(2) of the Biddut O Jalanir Druto Sharborah Briddhi (Bishesh) Ain, 2010 is a glaring instance of colorable legislation tainted with malice in law for providing unbridled, unaccountable control and power to the Ministry concerned while dealing, transecting or using electricity of the country with liberty to enter into a contract or agreement at his own choice without any requirement to be bound by procedural safeguards and at the cost of the expenditure to be borne by the Republic. The people of the country are the actual owners/proprietors of all the minerals, gas and electricity of the country. While dealing with those properties the executives act as the trustee of the people of the country. No doubt section 6(2) of the Act, 2010 has hit the core constitutional democracy and governance and is blatantly inconsistent with the guaranteed fundamental rights of the people of the country. This section is repugnant to and inconsistent with the mandate of the Constitution.